Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-630

STATE OF WASHINGTON, et. al.,
Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE INDIAN TRIBES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE INDIAN TRIBES

JURISDICTION

The United States has moved that *Washington v. United States and Yakima Tribe,* No. 3909, be dismissed for lack of three judge court jurisdiction, but has indicated that it does not challenge the jurisdiction in the instant case, No. 3868 below, involving Appellees Makah Indian Tribe, Lummi Indian Tribe and Confederated Tribes of the Colville Indian Reservation. Motion to Dismiss at 3. On February 21, 1979, this Court entered an order postponing consideration of jurisdiction to the hearing on the merits. Appendix [hereinafter App.] at 255. Although no party has raised any questions regarding the jurisdiction in the instant case, the Tribes briefly address it here.

This appeal is properly within the jurisdiction of the Court pursuant to 28 U.S.C. §1253 because the original action was properly within the jurisdiction of the three judge court pursuant to 28 U.S.C. §2281 as it then existed.[1] When this action was filed, a three judge federal district court was required by 28 U.S.C. §2281 to be convened in any action to enjoin enforcement of a state statute on grounds of its unconstitutionality under the Constitution of the United States.

In their Amended and Supplemental Complaint for Declaratory Judgment, Injunction and Damages, set out at App. 17, the Tribes sought injunctive relief against the State of Washington based on:

(1) A declaration that the State's cigarette excise tax, RCW Ch. 82.24, as applied to the Tribes, constituted an unconstitutional burden on Indian commerce "in violation of the preemptive right of Congress to regulate such commerce stated in Article 1, §8, cl. 3 of the United States Constitution . . . ." App. at 20-21.

(2) A declaration that the past and proposed actions of the State of Washington in stopping federally licensed, sealed trucks engaged in interstate commerce bringing tribal property to the Reservations constituted an unconstitutional burden on interstate commerce within the meaning of Article 1, §8, cl. 3 of the Constitution. App. at 23.

(3) A declaration that the enforcement measures of the State including the seizures outlined above, and the State's attempt to levy on Indian property denied the Tribes their property without due process of law and denied the Tribes equal protection of the law. App. at 24.

1. 28 U.S.C. §2281 was repealed by Act of Congress, 90 Stat. 119, in August, 1976. However, since this action was pending at the date of the repeal, it was not affected.

(4) A declaration that the assumption of jurisdiction over Indian reservations pursuant to Public Law 83-280 by the State of Washington was unconstitutional under the Fourteenth Amendment. App. at 25.

These multiple, interrelated claims provided an indisputable foundation for the convening of a three judge federal district court. *Query v. United States,* 316 U.S. 486 (1942); *Department of Employment v. United States,* 385 U.S. 355 (1966).

Although the Appellee Tribes also attacked the application and enforcement of the state tax laws on Supremacy Clause grounds, *cf. Swift and Co. v. Wickham,* 382 U.S. 111 (1965), the Tribes raised substantial constitutional grounds under other clauses of the Constitution. These claims are clearly not insubstantial. *See Goosby v. Osser,* 409 U.S. 512, 518 (1973).

On May 17, 1973, the date of filing of the instant case, the State of Washington claimed taxing authority over Washington Indian tribes and their enrolled members by virtue of its assumption of Indian jurisdiction under RCW 37.12 pursuant to P.L. 83-280. At the time, therefore, the taxing and Public Law 83-280 issues were interrelated.[2] The State's claim was not rejected until June 14, 1976, when this Court decided *Bryan v. Itasca County,* 426 U.S. 373 (1976). It was not until February 22, 1979 that Washington's partial assumption of jurisdiction was upheld by this Court in *State of Washington v. Confederated Bands*

2. The claim of unconstitutionality of the statute was enhanced significantly on April 29, 1977 when the Ninth Circuit Court of Appeals decided *State of Washington v. Confederated Bands and Tribes of the Yakima Nation,* 552 F.2d 1332 (1977), holding that Washington's partial assumption of jurisdiction violated the Equal Protection Clause of the United States Constitution.

and Tribes of the Yakima Indian Nation, ... U.S. ...., 58 L. Ed. 2d 740 (1979).

Further, as the District Court recognized, the Tribes' challenge of the state enforcement measures as violative of the Interstate Commerce Clause raises "a substantial federal question" under the Commerce Clause. 446 F. Supp. at 1350, Appendix to Jurisdictional Statement [hereinafter J.S. App.] at 14.

Finally, as noted above, the Tribes in their Complaint attacked Washington's cigarette excise tax laws, RCW Ch. 82.24, as violative of the Indian Commerce Clause. This question is clearly substantial. *See* Section III, *infra*, arguing that the state tax has been preempted by the Indian Commerce Clause because it interferes with essential tribal relations constitutionally reserved to Congress, and Section IV, *infra*, arguing that the state tax as applied and on its face, violates the Indian Commerce Clause of the Constitution because it makes no provision for "apportionment" between state and tribal taxes and thereby imposes a multiple tax burden which unconstitutionally discriminates against Indian commerce.

The other non-constitutional grounds raised by the Tribes were properly decided by the three judge federal district court by virtue of the established rule that whenever a three judge district court is required, it has jurisdiction over all grounds of attack upon a statute.[3]

3. *See* C. WRIGHT, LAW OF FEDERAL COURTS, §50 at 191 (1970), *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960). The three judge court also had jurisdiction to decide pendant and ancillary claims of Appellees because they all rested upon a single and interrelated complex of facts. *Haining v. Roberts*, 453 F.2d 1223 (5th Cir. 1971). *See also Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971); *Doe v. Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972); *Prigmore v. Renfro*, 356 F. Supp. 426 (N.D.Ala. 1972), *aff'd*, 410 U.S. 919 (1973).

QUESTIONS PRESENTED

1. May Appellee Tribes levy a tax upon cigarettes sold on their Reservations to non-Indians in circumstances in which the tax is included in the purchase price and passed on to the buyer so that the legal incidence of the tax is upon the non-Indian?

2. Does superimposition of the state cigarette excise tax upon sales of cigarettes that are already subject to the regulation and tax imposed by the tribal ordinances constitute a prohibited interference with tribal self-government?

3. Is the state cigarette excise tax, as applied to sales of cigarettes by Appellee Tribes on their Reservations to non-Indians, preempted by the Indian Commerce Clause because it interferes with essential tribal relations which are the exclusive prerogative of Congress?

4. Is imposition of the state cigarette excise tax, as applied to the sales of cigarettes by Appellee Tribes on the Reservations to non-Indians, preempted by federal statutes, regulations and policies promoting tribal self-government, self-determination, and economic self-sufficiency?

5. Does imposition of the state cigarette excise tax on Reservation sales of cigarettes by the Appellee Tribes, which have already been subject to a tribal tax, impose a multiple tax burden which discriminates against Indian commerce in violation of the Indian Commerce Clause?

6. Is imposition of the state cigarette excise tax and the collection requirements set out in state statutes and regulations, as applied to licensed federal traders on the Reservations, preempted by the Federal Traders statutes?

7. What is the legal incidence of the state cigarette excise tax with respect to Reservation sales by Appelleee Tribes?

8. Does the State have authority to impose an excise tax, nominally for the privilege of using a motor vehicle within the State, but measured by the fair market value of the vehicle, upon motor vehicles, travel trailers and campers owned by Indians and used both on and off the Reservations?

STATEMENT OF THE CASE

This statement is intended to supplement the Statement of the Case set out in the State Brief at 7-26. The essential facts in this case were stipulated in the Pre-Trial Order, App. at 28, 31-47, and are also set out in the opinion of the District Court.

The Appellee Tribes, Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe and Makah Indian Tribe, are each located on remote and underdeveloped reservations; most essential goods and services are located off the Reservation. 446 F. Supp. at 1346, J.S. App. at 4. The Reservations are plagued by substantial unemployment, App. at 37, 41, and, like many other reservations, have an extremely "limited tribal tax base." 446 F. Supp. at 1362, J.S. App. at 37.

Each of the Appellee Tribes is a quasi-sovereign Indian tribe recognized by the United States and governed by a council under a constitution and bylaws approved by the Secretary of the Interior.[4] 446 F. Supp. at 1345, J.S. App.

4. The Makah Indian Tribe is organized under the Indian Reorganization Act of 1934, 25 U.S.C. §476; the Colville and Lummi Tribes voted in 1935 not to come under the provisions of the Act.

at 4. App. 60, 66 (Colville Confederated Tribes); App. 73, 78 (Lummi Indian Tribe); App. 80, 96 (Makah Indian Tribe). Each constitution provides that the Tribe has power to levy taxes on Indians and non-Indians, but requires any tribal ordinance asserting taxing power over non-Indians to be approved by the Secretary of the Interior.

Each Tribe has enacted a tobacco ordinance regulating the sale, distribution and taxation of cigarettes on its Reservation, and each ordinance has been approved by the Secretary of the Interior. The ordinances provide that the cigarette tax is a tax upon the distribution of cigarettes on the Reservations by the respective Tribes through their tribal outlets and require the amount of the tax to be added to the retail price of the cigarettes. The legal incidence of the tax therefore is on the purchaser of the cigarettes, and is imposed upon both members and non-members. The Colville Indian Tribe imposes a tax of four cents per package, $.40 per carton, and the Lummi and Makah Indian Tribes impose a tax of five cents per package, $.50 per carton.[5] Pre-Trial Order, §2.5, App. at 32-33.

The tribal cigarette taxes are critical sources of revenue for the funding of various tribal governmental programs. From 1972 through 1976, the Colville Tribe earned approximately $265,760 from its cigarette tax, the Lummi Tribe earned approximately $54,440, and the Makah Tribe earned approximately $13,490 from its tax. 446 F. Supp. at 1347, J.S. App. at 7. The tax revenues are used by the Tribes for a broad spectrum of governmental programs

5. The tribal taxing ordinances have been amended to impose the taxes described in the text and the amendments became effective before the entry of the Pre-Trial Order. The copies of the Colville and Lummi Ordinances set out in Exhibits 10.8 and 10.10 of the Prie-Trial Order, App. at 104, 118, do not reflect this amendment, however.

benefiting their members. *See* Pre-Trial Order §§2.12 and 2.19, App. at 36, 40. As the District Court summarized:

> The revenue generated by the taxes to date has been devoted to the partial funding of programs such as day care, education, nutrition, fire protection and alcoholism of reservation people.

446 F. Supp. at 1361, J.S. App. at 35.

Further, the tribal ordinances are not merely tax generating provisions, but are also "comprehensive scheme[s] for the licensing, regulation, and taxation of the sale of cigarettes on the reservations." 446 F. Supp. at 1348, J.S. App. at 8. Each ordinance provides that the tobacco products, including cigarettes, remain the property of the Tribe until sold to the ultimate consumer, requires the operator of the tribal outlet to obtain both tribal and federal trader's licenses supported by adequate personal and property liability insurance, and provides that no sales shall be made to minors. Each ordinance also sets forth penalties for violations.

Each ordinance provides that no more than three cartons of cigarettes shall be sold to any non-Indian purchaser, App. at 108, 115, 122, a restriction designed to prevent non-Indian purchasers from reselling the purchased cigarettes off the Reservation without paying state taxes. Under the provisions of the ordinances, the operator of the tribal outlet acts as agent of the Tribe in selling the cigarettes. He is, however, entitled to keep the difference between the wholesale cost which he pays to the Tribe and the retail price as his compensation.

For approximately nine years, the State of Washington has been attempting to require the Tribes to collect the state cigarette excise tax in the amount of $.16 per package, $1.60 per carton, on sales to non-Indians. Although the State maintains that the legal incidence of its tax as applied to sales by the Tribes to non-Indians is upon the non-Indian consumer, that is disputed by the Tribes.

Pursuant to the provisions of RCW 82.24.020, the state tax is levied upon the "sale, use, consumption, handling, possession, or distribution of all cigarettes . . . ." RCW 82.24.080 provides that it is the intent of the legislature to collect the tax from the person who "first sells, uses, consumes, handles, possesses . . . or distributes" cigarettes in the State, and provides that the legal incidence of the tax shall be imposed upon the first taxable event occuring within the State. The Washington State Supreme Court, *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974), and the State Department of Revenue, *see* WAC 458-20-192, App. V to State Brief, and Excise Tax Bulletin 504.08.192, App. W to State Brief, interpret the statute to mean that the legal incidence is upon the non-Indian purchaser in cases of sales by the tribal outlets.

The State also seeks to impose certain collection requirements upon the Tribes and tribal outlets. E.T.B. 504.08.192 would require the dealers to "demonstrate entitlement to make such sales without collection of tax" by keeping detailed records of sales to Indians. The tribal sellers would be required to record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations to which or within which such sales are made and the dollar amounts and dates of the sales. The dealer would also be required by the regulation to insist upon the presentment of a tribal identification card if the Indian purchaser is not known

personally to the dealer. 446 F. Supp. at 1359, J.S. App. at 29-30.

All cigarette and tobacco products are purchased by the Tribes with federally restricted tribal funds from authorized out-of-state wholesalers. The products are shipped directly to the Tribes by sealed cargo trucks of licensed Interstate Commerce carriers. The State has attempted to enforce its law against the Tribes by seizing cigarettes in the stream of interstate commerce bound for the Reservations, Pre-Trial Order §§2.8-2.9, App. at 34-35, and has declared its intention to continue such seizures in the future. *Id.* §2.10, App. at 35. At the present time, the State is subject to a Preliminary Injunction issued by the District Court which prohibits such seizures. 446 F. Supp. at 1345, J.S. App. at 3.

The economic and practical impact of enforcement of the state tax against the Tribes is undisputed. If the state tax is imposed, a total excise tax burden of $.20 per package of cigarettes sold on the Colville Reservation, and $.21 per package on cigarettes sold on the Makah and Lummi Reservations, will be imposed. This compares with a total excise tax burden of $.16 per package as to cigarettes which are sold *off* the reservation. According to the undisputed testimony of an expert economist, sales of cigarettes face a highly elastic demand curve with respect to their own price in a competitive market, and as a result, "the volume of cigarette sales on most reservations will fall drastically" if the state tax is superimposed. Exhibit 10.19, App. at 125-27. As the District Court summarized:

> The facts dictate that the tribal taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus each Tribe's ability to fund its sponsored programs would suffer substantial interference.

446 F. Supp. at 1347, J.S. App. at 7-8.

This will in turn affect the ability of the Tribes to carry out their governmental programs. The District Court found that the result of imposition of the state taxes "will be the depletion of an already limited tribal tax base, probable destruction of the tribal enterprises and elimination of essential revenues needed for tribally sponsored programs." *Id.* at 1362-63, J.S. App. at 37. At the present time, nearly 90% of the Tribes' sales are made to non-Indians. 446 F. Supp. at 1347, J.S. App. at 7.

The Tribes have also successfully contested the application of the State's excise taxes on motor vehicles, RCW Ch. 82.44., and travel trailers and campers, RCW Ch. 82.50. The state statutes are labeled as excise taxes and are imposed and assessed annually upon a specified percentage of the fair market value of the vehicle for the privilege of using the vehicle within the State of Washington. Since each of the Reservations is remote and largely undeveloped, most essential goods and services needed by tribal members are located off the Reservation. Many reservation Indians own automobiles, and although some automobiles are used entirely on the Reservation, others are used both on and off the Reservation. Pre-Trial Order §§2.25-2.28, at 42-44.

SUMMARY OF ARGUMENT

I.

It has been settled for more than three-quarters of a century that tribal power to tax non-Indians relative to their on-reservation transactions with Indians is an essential attribute of the Tribes' original sovereignty never surrendered. *Morris v. Hitchcock*, 194 U.S. 384 (1904). The decisions of this Court also hold that Indian tribes have power to exercise civil jurisdiction over non-Indians involved in transactions with Indians on their reservations. *See Williams v. Lee*, 358 U.S. 217 (1959).

These powers have been repeatedly recognized by Congress. For example, after the Senate Committee on Indian Affairs had been specifically advised by the Commissioner of Indian Affairs that Indian tribes held power to tax non-Indians, Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. §476, which provided that any Indian tribe organized under the Act would continue to have "all powers vested by existing law." More recent statutes repeatedly recognize Indian tribes as units of government and Congress has adopted strong federal policies designed to encourage the exercise of tribal self-government. With respect to Appellee Tribes, the Secretary of the Interior has approved the assertions of tribal taxing power over non-Indians in their Constitutions and taxing ordinances.

Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), does not undermine the civil and taxing authority of tribes. The Court explicitly restricted its holding to criminal jurisdiction, 435 U.S. at 195, 196 n. 7, and the reasoning of the Court is entirely inapplicable to this case. Not only have the three branches of government repeatedly recognized

tribal taxing powers and civil powers over non-Indians generally, but the Court itself reconfirmed the existence of these powers in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978), a decision which was rendered *after Oliphant*.

II.

As distinguished from the tribes in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), each of the Appellee Tribes has enacted a comprehensive, federally approved ordinance regulating and taxing sales of cigarettes on its Reservation. The ordinances are both a critical source of revenues for essential tribal programs, and an exercise of the Tribes' powers of governance over the Reservations. It is undisputed that imposition of the state tax will not only substitute state substantive law for that of the Tribe, but destroy the tribal tax programs and jeopardize the governmental programs financed by them.

These impacts cannot be allowed to occur consistent with *Williams v. Lee*, 358 U.S. 217 (1959), which prohibits application of state laws which infringe on the right of reservation Indians to make their own laws and be ruled by them. *Id.* at 220. The *Williams* test was specifically designed to apply in situations like this one in which both a tribe and a state seek to apply their laws to an on-reservation transaction involving both Indians and non-Indians. The State may apply its law only up to the point where tribal self-government will be affected. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 179 (1973).

III.

The Indian Commerce Clause, like the Foreign and Interstate Commerce Clauses, is not merely a grant of

power to Congress, but also a source of restrictions upon the power of the states. A review of the history surrounding the execution of the Indian Commerce Clause demonstrates that it was drafted by the Founding Fathers to correct a series of problems which had arisen under the Articles of Confederation. The Articles had given Congress power to regulate Indian affairs, but had contained two provisos, one restricting federal power to Indians who were not members of the states, the other providing that the "legislative right" of any state would not be violated. The qualifying language of the Articles had been interpreted by several states to sanction their own independent regulation of Indian affairs, including attempts to negotiate treaties with the Tribes and to wage war against them.

A Committee Report in the Constitutional Convention proves that the Indian Commerce Clause, in its present form, was drafted in direct response to these state assertions and was designed primarily to thwart state attempts to govern political relations with the tribes. The basic purpose of the Indian Commerce Clause was to federalize the political relations of the tribes to the exclusion of the states. To accomplish this end, the qualifying language of the Articles was deleted, and specific reference was made in the Clause itself to "Tribes."

In light of this historical background, and the danger of frustration of federal policy by disparate actions of the states, Indian commerce, like foreign commerce, is entitled to special constitutional protection, and a "more extensive constitutional inquiry" is required when the state attempts to tax Indian as opposed to interstate commerce. *Cf. Japan Line, Ltd. v. County of Los Angeles*, ... U.S. ...., 60 L. Ed. 2d 336, 346 (1979). In light of this background, it is clear

that the state tax has been federally preempted. It interferes with prerogatives concerning relations with the tribes which are constitutionally reserved exclusively to the federal government.

The decisions of this Court support this analysis. The Court's holding in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), was specifically premised upon the negative implications of the Indian Commerce Clause, and *Williams v. Lee* and *McClanahan v. Arizona Tax Commision* held that while the broadest reaches of Justice Marshall's opinion have been qualified by subsequent cases, the negative implications of the Indian Commerce Clause are still intact, at least when "essential tribal relations" are involved. *Moe*, which noted that there were no longer any "automatic exemptions" arising under the Clause in cases involving state taxation of reservation Indians, does not diminish the utility of this constitutional analysis in situations in which the tribes can show either an impairment of essential tribal relations or a state tax which discriminates against the protected commerce. In the instant case the Tribes have made both showings.

Moreover, Congress has not remained idle, and the state tax conflicts with actual federal statutes and policies. In numerous statutes, including particularly the Indian Reorganization Act of 1934 and the Indian Self-Determination and Education Assistance Act of 1975, Congress has specifically legislated a national policy promoting Indian self-government and tribal self-determination. Imposition of the state tax is in irreconcilable conflict with these federal goals.

An examination of the federal preemption decisions of this Court demonstrates that this Court has not hesitated

to strike down state law conflicting with federal policies, particularly when the field has been historically committed to federal rather than state law and when the state does not have a strong interest in protecting some essential interest of its citizens such as public health or safety. Since Indian affairs have been traditionally committed to Congress and since the only interest asserted by the State is its general need to raise tax revenue, there is little room here for the operation of state law.

The preemptive scope of federal law is particularly broad in Indian cases. *See McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973); *Fisher v. District Court,* 424 U.S. 381 (1976). In *Fisher,* this Court held that when a tribe exercises the powers granted it under its federally-approved constitution, "it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction." 424 U.S. at 390.

IV.

The state tax, as applied to Appellee Tribes, will, in combination with the tribal taxes, impose a multiple tax burden on Indian commerce which is not shared by off-reservation commerce. It thereby unconstitutionally discriminates against Indian commerce. By analogy to the Interstate Commerce Clause decisions of this Court, this result is impermissible. *See Evco v. Jones,* 409 U.S. 91 (1972); *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977). A state may no more discriminate against Indian than foreign or interstate commerce. The Washington State tax does not give credit for taxes paid to the Tribes, and, if imposed, will not only discriminate against, but will actually destroy the protected commerce.

V.

In *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685 (1965), this Court held an Arizona tax on the gross receipts of a non-Indian federal trader trading with Indians preempted by the Federal Traders statutes and regulations which it found to be so comprehensive as to leave no room for state laws imposing additional burdens on traders. 380 U.S. at 690. In the instant case, the situation is reversed because the State is attempting to impose burdens on an Indian federal trader doing business with non-Indians. Nevertheless the burden falls on the trader and has been preempted. In addition, state law, if applicable, would impose serious burdens regarding collection and record-keeping upon federal traders. The District Court currently held that these additional burdens were prohibited. 446 F.Supp. at 1359, J.S. App. at 29-30.

VI.

The decisions of this Court hold that in construing a federal exemption from state taxes, the federal courts are not bound by the decisions of the state courts concerning its legal incidence. In the instant case, an examination of the state statute indicates that the legal incidence of the tax along with the duty of its collection and payment falls upon the first person who commits in the State any of a series of acts including possession, distribution and sale of cigarettes. Since all of these acts are performed by the Tribes, based on the statutory language, the legal incidence of the tax should fall upon them.

The State argues, however, that in the single case of sales by Indian tribes, the incidence falls upon the non-

Indian *purchaser* not the seller or wholesaler. The duty to pay the tax, however, remains upon the Tribe. If the State correctly interprets the statute, it obviously has a discriminatory effect. In every situation but one, the legal incidence and the obligation to collect and pay the tax fall upon the same person, the person who first performs any of the statutorily enumerated acts. In the single case of Indian Tribes, however, the obligation to pay the tax remains with the Tribe while the legal incidence moves on down the chain of events to the non-Indian purchaser. This distorted reading of the statute, designed only to extricate the State from the Court's holdings in *McClanahan* and *Moe*, cannot be sustained.

VII.

The state motor vehicle excise tax, although nominally an excise tax imposed for the privilege of using a motor vehicle in the State of Washington, RCW 82.44.020, is measured by a percentage of the fair market value of the vehicle. In *Moe v. Confederated Salish and Kootenai Tribes, supra*, this Court struck down a Montana tax which was identical in operation. That tax, however, was labeled as a property tax. The decisions of this Court, particularly in the interstate commerce area, reveal that the validity of a tax ought not to turn on such nominal considerations but rather upon practical economic effects. *See Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). Notwithstanding the fact that automobiles may be used by their Indian owners partly off the reservation, the tax, no less than the one struck down in *Moe*, operates upon the property of a reservation Indian and is therefore invalid. *See McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).

ARGUMENT

I. The Colville, Makah and Lummi Tribes Retain Power to Tax Non-Indians Doing Business with Indians on the Reservation.

Introduction

The State of Washington did not originally contest the jurisdiction of the Appellee Tribes to levy their cigarette taxes on non-Indians doing business with the tribal retail outlets.[6] But in its Brief on the Merits, it now argues, based on its reading of *Oliphant*, that "[a]mong those powers which are inconsistent with tribal status is the general power of taxation as applied to non-Indians." State Br. at 76. The primary focus of the State's argument, however, seems to be that while the Tribes may have power to tax as an incident of their power to exclude non-members from the Reservation, State Br. at 77, imposition of the state tax is valid because it does not conflict with the Tribes' power of exclusion.[7] *Id.* at 78-79.

Clearly, the decision of the District Court below and the arguments of the Appellee Tribes are grounded in part on the validity of the exercise of tribal taxing power under the circumstances of this case. Accordingly, the legal basis

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6. The State did file a Motion for Partial New Trial arguing that *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), and *United States v. Wheeler*, 435 U.S. 313 (1978), eliminated tribal jurisdiction to tax non-Indians. J.S. App. at 75. Similarly, in its Jurisdictional Statement at 18, relying on *Oliphant*, the State argued that

> [w]hether exercising the taxing power over non-Indians is inconsistent with the Tribes' status is an important federal question.

It did not, however, include the issue in its Questions Presented.

7. However, as discussed in Section II *infra*, the test for the validity of state jurisdiction over non-Indians engaged in transactions with Indians on a reservation is not whether it conflicts with tribal power to exclude non-members from the reservation but rather whether it interferes with tribal self-government. *See generally Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

for such authority will be set out in this Brief. This discussion will also lay the foundation for the later sections of the Brief, particularly the argument that imposition of the state tax impermissibly interferes with tribal self-government, Section II, and the argument that the state tax has been preempted, Section III. At the outset, however, the Tribes would caution that despite the urging of Amicus Curiae supporting the State, this case does not present a suitable vehicle to determine generally the scope of tribal civil jurisdiction over non-Indians because of the limited nature of the exercise of jurisdiction by the Appellee Tribes.

The respective tribal taxes are levied on sales of cigarettes by the tribal retail outlets to Indians and non-Indians. All of the transactions at issue take place on trust land within the boundaries of the Reservations. The contacts between the non-Indians and the tribal businesses are entirely consensual and no non-Indian taxpayers have challenged the validity of the tribal tax. Further, because of the structure of the tribal taxes, the taxes are included in the purchase price of the goods sold and are automatically remitted by the taxpayer upon purchase. The Tribes therefore need not resort to either criminal or civil jurisdiction in tribal, federal or state court to enforce the tax. While the precedents discussed below which support the Tribes' ability to levy the taxes in question sanction considerably broader exercises of tribal civil and taxing jurisdiction over non-Indians, it should be kept in mind that the actual exercise of tribal jurisdiction in this case is quite narrow.

A. The decisions of this Court and the lower federal courts recognize that tribal power to tax non-Indians on the reservation is an essential attribute of original sovereignty never surrendered by the Tribes. This power has been ratified by Congress in various statutes and the Executive Branch of the United States Government has consistently and explicitly recognized tribal power to tax non-Indians.

Contrary to the urging of the State and supporting Amicus Curiae, *Oliphant* did not overrule, explicitly or by implication, the well-established precedents of this Court sustaining tribal civil and tax jurisdiction over non-Indians doing business on the reservation; nor did it signal a complete turnabout in Indian law concerning the respective powers of states and tribes over on-reservation transactions between Indians and non-Indians. Any question as to an Indian tribe's power to tax non-Indians doing business on the reservation has been settled for almost three quarters of a century. *See e.g., Morris v. Hitchcock,* 194 U.S. 384 (1904); *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation,* 259 F.2d 553 (8th Cir. 1958).

In *Morris v. Hitchcock,* 194 U.S. 384 (1904), this Court upheld the authority of the Chickasaw Nation to impose an annual permit tax upon non-Indian owned livestock grazing on the reservation. Although the tribal tax had been approved by the President pursuant to the provisions of the Curtis Act, the taxing power of the Chickasaw Nation over non-members clearly preceded the passage of the Curtis Act:

> Viewing the Curtis Act in light of the previous decisions of this court and the dealings between the Chickasaws and the United States, we are of the opinion

> that one of the objects occasioning the adoption of that act . . . *was to permit the continued exercise, by the legislative body of the tribe, of such power as is here complained of,* subject to a veto power in the President over such legislation, as a preventive of arbitrary and injudicious action.

194 U.S. at 393. (emphasis added)[8]

Similarly, in *Buster v. Wright,* 135 F. 947 (8th Cir. 1905) *appeal dismissed,* 203 U.S. 599 (1906), tribal jurisdiction to levy a permit tax on a non-Indian for the privilege of conducting business within the reservation was sustained. The Court of Appeals stated:

> Repeated decisions of the courts, numerous opinions of the Attorneys General, and the practice of years place beyond debate the propositions that prior to March 1, 1901, the Creek Nation had lawful authority to require the payment of this tax as a condition precedent to the exercise of the privilege of trading within its borders, and that the Executive Department of the government of the United States had plenary power to enforce its payment through the Secretary of the Interior and his subordinates . . .

135 F. at 949. More recently, in *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685 (1965), this Court strongly implied that a tribe could levy a tax on a non-Indian federal trader licensed to do business on the reservation. In striking down a state tax on this trader the Court stated:

> This state tax on gross income would put financial burdens on Appellant or the Indians with whom it deals *in addition to those Congress or the tribes have prescribed* . . .

380 U.S. at 691. (emphasis added) *See also Maxey v.*

8. Similar protections have been carried over to the present day. As discussed below, tribal constitutions asserting power to tax non-Indians typically include a requirement for Secretarial approval of any ordinance exercising that power.

Wright, 54 S.W. 807 (1900), *aff'd,* 105 F. 1003; *Crabtree v. Madden,* 54 F. 426 (8th Cir. 1893); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation,* 231 F.2d 89 (8th Cir. 1956); and *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation,* 259 F.2d 553 (8th Cir. 1958), upholding tribal jurisdiction to tax as an exercise of inherent tribal sovereignty.[9]

Similarly, the Executive Branch has consistently recognized such taxing power. One of the opinions relied upon by this Court in *Oliphant,* 435 U.S. at 199, distinguished criminal from civil jurisdiction. 7 Op. Atty. Gen. 174 (1855). The Attorney General opined that while criminal laws of the United States assuming jurisdiction over crimes committed by white persons removed the criminal jurisdiction of the tribe over non-Indians, there was "no provision of treaty, and no statute which takes away from the Chocktaws jurisdiction of a case like this [a civil property dis-

9. Other cases supporting tribal jurisdiction to tax or otherwise exercise power over the property of non-Indians include *Hamilton v. United States,* 42 Ct. Cl. 282 (1907); *United States ex rel. Rollingson v. Blackfeet Tribal Court,* 244 F. Supp. 474 (D. Mont. 1965); *Hot Oil Service, Inc. v. Hall,* 366 F.2d 295, 296 (9th Cir. 1966); *Kain v. Wilson,* 161 N.W.2d 704, 705 (S. Dak. 1968); *Schantz v. White Lightning,* 502 F.2d 67 (8th Cir. 1974); *Littell v. Nakai,* 344 F.2d 486 (9th Cir. 1965), *cert. denied,* 383 U.S. 986; *O'Neal v. Cheyenne River Sioux Tribe,* 482 F.2d 1140 (8th Cir. 1973); *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976), *cert. denied,* 430 U.S. 983; *Mescalero Apache Tribe v. O'Chesky,* 439 F. Supp. 1063, 1073 (D.N.M. 1977); *Eastern Band of Cherokee Indians v. State,* No. BC-C-76-65 (D.N.C. August 27, 1976), *aff'd Eastern Band of Cherokee Indians v. North Carolina Wildlife Comm'n,* 588 F.2d 75 (4th Cir. 1978); *Petition for Cert. filed,* 47 U.S.L.W. 3730 (1979); *Wilson v. Turtle Mountain Band of Chippewa Indians,* 459 F. Supp. 366 (D.N.D. 1978). *See also,* Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands,* 124 U. PA. L. REV. 491, 503-507 (1975); Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians,* 40 L. AND CONTEMP. PROB. 166 (1976); Collins, *Implied Limitation on the Territorial Jurisdiction of Indian Tribes,* 54 WASH. L. REV. 479 (1979); Barsch, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique,* 54 WASH. L. REV. 531 (1979).

pute]." 7 Op. Atty Gen. at 179.[10] Moreover, two subsequent opinions of the Attorney General confirm tribal civil jurisdiction over non-Indians. *See* 17 Op. Atty. Gen. 134 (1881) and 23 Op. Atty. Gen. 214 (1900).[11]

Even more important, however, was an opinion of the Solicitor for the Department of the Interior in 1934. In §16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476, Congress provided that tribal governments organized pursuant to the Act would have certain enumerated powers *and* those "powers vested in any Indian tribe or tribal council by existing law." That same year, at the request of Congress, the Solicitor for the Department of Interior set forth the position of the United States as to the existing "powers of Indian tribes." Solicitor's Opinion, 55 I.D. 14 (1934). That Opinion provides:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

Id. at 46. (emphasis added)[12]

Moreover the Secretary of the Interior has approved the assertions of taxing jurisdiction in the Constitutions and

10. While, strictly speaking, the Opinion dealt with the question of civil jurisdiction over a white man who had become adopted into the Tribe, the critical point for present purposes is that the Opinion distinguishes between criminal and civil jurisdiction over non-Indians.

11. The former opinion held that permit laws of the Chocktaw and Chickasaw Tribes governing the terms under which nonmembers could enter and reside within their territory were valid as applied to white persons and the 1900 opinion upheld the validity of a permit tax of the Five Civilized Tribes as applied to citizens not members of the tribes desiring to transact business with the Reservation.

12. The Solicitor's Opinion was cited with approval by this Court in *United States v. Wheeler*, 435 U.S. 313, 328 (1978).

ordinances of each of the three Appellee Tribes. *See* CONSTITUTION OF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, art. V, §1(e), approved April 19, 1938, App. 60, 66; CONSTITUTION OF THE LUMMI TRIBE, art. VI, §1(f), approved April 10, 1970, App. 73, 78; CONSTITUTION OF THE MAKAH INDIAN TRIBE, art. VI §1(g), approved May 16, 1936, App. 86, 90. Each Constitution requires that any taxing ordinance adopted by the Tribe affecting non-members be approved by the Secretary.[13] Each of the tribal taxing ordinances involved in the present litigation specifically asserts the power of the Tribe to tax non-Indians. Each has been approved by the Secretary.[14] These approvals are specific Executive affirmations that the Appellee Tribes have power to tax non-Inlians. *See also* Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 L. AND CONTEMP. PROB. 166, 169-73 (1976).

Congress also has ratified tribal taxing powers over non-Indians. In confirming the existence in Indian tribes of all powers vested by existing law in §16 of the Indian Reorganization Act, 25 U.S.C. §476, Congress was well aware

13. The provisions in these tribal constitutions regarding taxing authority over non-Indians along with the requirement for Secretarial approval of taxes levied on non-Indians are typical. *See* F. COHEN, FEDERAL INDIAN LAW 439 (1966 Ed.).

14. Obviously, the provisions for Secretarial approval of the taxing ordinances provide substantial protection for non-Indians. As this Court noted in *Martinez v. Santa Clara Pueblo*, 436 U.S. 49, 66 n. 22:

> Many tribal constitutions . . . include provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval. . . . In these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior.

A recent example of how this protection can operate was provided in the State of Washington when the Tulalip Tribe adopted a business and utility tax effective against both Indians and non-Indians on the Reservation. The Department of the Interior refused to approve the ordinance on the ground that it did not comply with the provisions of the Indian Civil Rights Act because the appeals process set up under the ordinance was inadequate. *See* Everett Herald, May 12, 1979 at 8-A.

that such tribal taxing power existed. Not only were tribal taxing powers over non-Indians well-recognized by the courts and the Executive Branch *before* the passage of the Act in 1934, but the legislative history of the Act indicates that Congress was specifically advised of this power. During a hearing before the Committee on Indian Affairs, Commisioner Collier of the Bureau of Indian Affairs, in response to an expression of concern by several committee members, presented a short brief describing Indian taxing power which referred to *Buster v. Wright* and its holding that Indian tribes may levy a permit tax on non-Indians within the reservation.[15] In this context, §16 of the Act specifically confirms tribal taxing power. *Iron Crow v. Ogala Sioux Tribe*, 231 F.2d 89, 99 (8th Cir. 1956). *See also* Goldberg, *supra* at 170.[16]

The Indian Reorganization Act generally was designed, among other things, "to grant certain rights of home rule to Indians." Preamble to Act, 48 Stat. 984. This Court has described the Act as "specifically intended to encourage Indian tribes to revitalize their self-government." *Fisher v. District Court*, 424 U.S. 382, 387 (1976). Although the governmental powers of the tribes preceded the passage of the Act, Congress, in setting up a statutory framework for the exercise of tribal governmental authority, provided that

15. *See* Hearings Before the Committee on Indian Affairs, United States Senate on S. 2755 and S. 3645 (73rd Cong. 2d Sess. 269-70 (1934)). The Commissioner's brief is set out at 268 et seq. and the discussion of *Buster v. Wright* appears at 269 under the heading "Power of Congress to Authorize an Indian Tribe to Levy Assessments and Taxes."

16. It is true, of course, that this Court in *Oliphant* held that the Indian Reorganization Act did not confirm tribal *criminal* jurisdiction over non-Indians. 435 U.S. at 195 n. 6. But that was surely only because the authorities were in agreement that no such powers existed in 1934 when the Act was passed. Tribal taxing power on the other hand, had long been recognized, as Congress was carefully advised both before and after the Act's passage.

when a tribe acts in its governmental capacity it implemented *federal* policy even though it exercised tribal authority. *Fisher v. District Court*, 424 U.S. at 390.[17]

The Indian Civil Rights Act of 1968, 25 U.S.C. §1301 et. seq., has a similar focus. As this Court noted in its comprehensive interpretation of the Act in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978):

> Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." [citations omitted] This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself.

The Court noted that rather than providing for a wholesale incorporation of constitutional requirements to tribal governments, Congress selectively incorporated and in some instances modified the provisions of the Bill of Rights so as to "fit the unique, political, cultural, and economic needs of tribal governments." 436 U.S. at 62. The Court also noted that the other titles of the ICRA manifest a "congressional purpose to protect tribal sovereignty from undue interference," reflected particularly in the provisions of the Act holding that states "may not assume civil or criminal jurisdiction over 'Indian country' without the prior consent of the tribe." 25 U.S.C.§§1321-26, 436 U.S. at 63-64. The protections of the ICRA extend to all persons, Indians and non-Indians. 25 U.S.C. §1302.[18]

17. *See* Section III C at 105, *infra*.

18. It is true that this Court in *Oliphant* rejected respondent's argument that the Indian Civil Rights Act of 1968, 25 U.S.C. §1302 et seq., recognized tribal *criminal* jurisdiction because the final version of the Act extended the constitutional protections to "any person" rather than

[Footnote continued on page 28]

Congress also gave implicit recognition to tribal civil jurisdiction over non-Indians in the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. §450. In *Bryan v. Itasca County*, 426 U.S. 373, 389 n. 14 (1976), this Court noted the focus of the Act on enhancing tribal self-government. 25 U.S.C. §450(a) contains a congressional statement of findings:

> The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that —
>
> . . .
>
> (2) the Indian people will never surrender their desire to control their relationships both among themselves *and with non-Indian governments, organizations, and persons.*

(emphasis added) In §3 of the Act, 25 U.S.C. §450a, Congress declared its policy to be

> to respond to the strong expression of the Indian people for self-determination . . .

and to maintain

> the Federal Government's unique and continuing relationship with and responsibility to the Indian people

only to "American Indians" as an earlier version of the Act had provided. The Court noted:

> The purpose of the later modification was to extend the Act's guarantees to "all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians." Summary Report on the Constitutional Rights of American Indians, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong. 2d Sess. 10 (1966). But this change was certainly not intended to give Indian tribes criminal jurisdiction over non-Indians. Nor can it be read to "confirm" respondents' arguments that Indian tribes have inherent criminal jurisdiction over non-Indians.

435 U.S. at 195 n. 6.

On the other hand, if tribes have neither criminal jurisdiction as *Oliphant* holds, nor civil or taxing jurisdiction as the State and its supporting Amicus Curiae contend, the change would have been completely gratuitous, an unpersuasive interpretation especially in light of the Indian Reorganization Act's confirmation of taxing power over non-Indians.

> through the establishment of a meaningful Indian self-determination policy. . . .

The recognition of tribal desire for control over non-Indians on the reservation and the declaration of congressional policy to promote tribal self-determination are highly significant. The tribes have successfully levied taxes on non-Indians doing business on the reservation with congressional, administrative and judicial approval for almost a century; the 1975 congressional endorsement of tribal self-determination occured in the context of this long-standing judicially-sanctioned exercise of tribal taxing jurisdiction over non-Indians.[19]

Moreover, in numerous other statutes, Congress has given general recognition to Indian tribes as units of local government. For example, in 40 U.S.C. §461, Indian tribes are eligible as local governmental units to receive federal assistance to facilitate comprehensive planning for urban and rural development. *See also* the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1227(b)(4); the Economic Opportunity Act of 1964, 42 U.S.C. §2790(a) and (c); the Solid Waste Disposal Act, 42 U.S.C. §6903(13); the Housing and Urban Development Act of 1965, 42 U.S.C. §3106(b); and the Tribally Controlled Community College Assistance Act of 1978, 25 U.S.C. §1801 et. seq.

In a similar vein, Congress, in enacting 28 U.S.C. §1362, 80 Stat. 880 (1966), gave authority to tribes to bring lawsuits in federal court for any cause arising under the laws or Constitution of the United States in situations where the

19. In addition, the fact that Congress has at times expressly terminated the taxing power of Indian tribes, further evidences a congressional belief that such power, absent termination by Congress, exists. *See e.g.*, Act of April 26, 1906, §11, 34 Stat. 137, 141, terminating the taxing power of the Five Civilized Tribes. *Cf. Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976).

United States would itself have jurisdiction to bring the suit. As this Court recognized in *Moe*, the statute in effect authorizes the tribe to act as *parens patriae* to vindicate the legal rights of its members. 425 U.S. 468-69 n. 7 and 472-75. The Court noted that the substantive interest which Congress desired to protect in the Act was tribal self-government. *Id.* at 468 n. 7.

Several recent statutes give implicit recognition to tribal power over non-Indians. The Clean Air Act Amendments of 1977, 91 Stat. 685, 735, provide that for purposes of designation of areas by class concerning air quality, "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." *Id.*, §164(c). The statute provides further that if any state is adversely affected by tribal redesignation of its reservation, it may invoke a mediation process. A tribe may do the same if it is injured by a state redesignation. *Id.*, §164(e). Clearly the Act recognizes tribal authority to make a designation effective within the entire reservation, notwithstanding the presence of non-Indians. *See also* the Surface Mining and Reclamation Act of 1977, 30 U.S.C. §1300, 41 Stat. 445, 523.[20] The Indian Child Welfare Act of 1978, 25 U.S.C. §1901 et. seq., vests in an Indian tribe exclusive jurisdiction "as to any State" over any child custody proceeding involving an Indian child who is domiciled or resides within the reservation of the tribe. 25 U.S.C. §1911. Since the

20. The Act provides that the Secretary shall consult with Indian tribes and prepare a report including "proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." §710(a), 30 U.S.C. §1300. Indian lands are defined by the Act as including all land within the reservation including fee patent land. §701(9), 30 U.S.C. §1291(9).

Act defines Indian child as the "biological child of a member of an Indian tribe" it is clear that such jurisdiction may be exercised by the tribe notwithstanding the race of the Indian child's other parent.

While the federal statutes described in this section do not specifically mention tribal power to tax, a general power of taxation is so fundamental to the existence of any government that express federal recognition of Indian tribes as governmental entities carries with it an implicit recognition of that power. *Buster v. Wright, Iron Crow v. Oglala Sioux*, the Solicitor's Opinion regarding powers of Indian tribes, and Cohen all rely heavily on this factor in concluding that power to tax remains an essential attribute of tribal sovereignty. Further, our own well-established political traditions confirm that taxation is an absolutely essential function of government. In THE FEDERALIST, Alexander Hamilton wrote:

> Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue: either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and, in a short course of time, perish.

THE FEDERALIST No. 30 (A. Hamilton).

These considerations apply with particular force on the reservations because of the endemic poverty and the lack of an adequate tax base. *See* Section II, *infra*. Tribal governments are therefore particularly vulnerable, a factor giv-

en express consideration by this Court in its holding in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In refusing to hold that the Indian Civil Rights Act, 25 U.S.C. §1302, created a federal cause of action against the tribes, the Court stated that such a result "plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums . . . *but it would also impose serious financial burdens on already 'financially disadvantaged' tribes.*" 436 U.S. at 64. (emphasis added)

Further, in light of Congress' policy of Indian self-determination, it is not surprising that basic decisions, such as whether a tribe elects to tax non-Indians, have been left to the tribes themselves. It would defeat self-determination for Congress to determine in statutory detail what the tribes could and could not do, and Congress has never attempted to do so. The basic constraints on tribal action have been set out by Congress in the Indian Civil Rights Act of 1968 and, in light of its consistent ratification of tribal self-government, tribal powers to tax non-Indians remain extant. In light of the well-established history of exercise of tribal taxing power, if a basic change in the nature of tribal governments is to be made, and tribal power to tax non-Indians terminated, that decision rests in Congress.

B. *Oliphant v. Suquamish Tribe* is expressly limited to the question of tribal criminal jurisdiction over non-Indians; it does not extinguish all tribal governmental authority over non-Indians on the Reservation.

The State and its supporting Amicus Curiae argue that the executive, legislative and judicial authorities outlined in the previous section were overruled by implication in *Oliphant*. That argument is not well-founded. Not only

were these precedents unaffected, but the Court in *Oliphant* relied upon *Morris v. Hitchcock, supra*, 435 U.S. at 206, thereby implicitly confirming the continued vitality of tribal jurisdiction to tax non-Indians.[21]

Moreover, the Supreme Court in *Oliphant* did not mention much less overrule the series of Supreme Court precedents supporting tribal civil jurisdiction over non-Indians. *See Williams v. Lee*, 385 U.S. 217, 220 (1959); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 179 (1973); *United States v. Mazurie*, 419 U.S. 544, 554 (1975); *Fisher v. District Court*, 424 U.S. 382, 386 (1976).

The conclusion that the Supreme Court's holding in *Oliphant* cannot be gratuitously extended to overrule prior decisions of this Court upholding tribal civil jurisdiction and taxing authority over non-Indians is inescapable particularly in light of the post-*Oliphant* reaffirmation of tribal civil jurisdiction over non-Indians in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978):

> Tribal courts have repeatedly been recognized as appropriate forums for the *exclusive* adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

436 U.S. at 65 (citing *Fisher v. District Court*, 424 U.S. 382 (1976) and *Williams v. Lee*, 358 U.S. 217 (1959)). (emphasis added) It is quite impossible to reconcile the Court's statement with the assertion of the State and its Amicus Curiae that tribes no longer retain inherent civil or taxing jurisdiction over non-Indians. *See* Section I C, *infra*.

21. This Court cited *Morris v. Hitchcock* for the proposition that commonly shared assumptions of Congress, the Executive Branch and the lower federal courts concerning tribal jurisdiction carried considerable weight. In the section of *Morris* specifically cited by this Court in *Oliphant*, the Court had relied upon an opinion of the Attorney General of the United States holding that the Tribe had jurisdiction to tax non-Indians on the reservation.

In *Oliphant* itself, the Court made it explicitly clear that it dealt *only* with tribal *criminal* jurisdiction:[22]

> We granted certiorari, 431 U.S. 964 . . . to decide whether Indian tribal courts have criminal jurisdiction over non-Indians. We decide that they do not.

Id. at 195.

> The case before us is concerned only with the criminal jurisdiction of tribal courts.

Id. at 196 n. 7.

Further, the *rationale* of the Court in *Oliphant* does not support the conclusion that Indian tribes do not have civil and taxing jurisdiction over non-Indians involved in transactions with Indians on the reservation. Consideration of the factors that led the Court to conclude that tribal criminal jurisdiction over non-Indians was prohibited necessarily leads to the opposite conclusion with respect to tribal jurisdiction to tax.

A prominent factor in the Court's reasoning centered on the United States' comprehensive assumption of criminal jurisdiction over non-Indians. As the Court noted, 435 U.S. at 201, the extension of federal law to non-Indian crimes on Indian reservations happened very early in the course of this nation's dealings with the Indian tribes, beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137. In 1817, Congress extended federal enclave law to Indian country generally, the only exception being for "any offense committed by one Indian against another." 3 Stat. 383 as amended, 18 U.S.C. §1152. The Court noted that it had held in *In re Mayfield*, 141 U.S. 107 (1891), that the general object of these criminal statutes was to reserve to the courts of the United States criminal jurisdiction of all actions to which its own citizens were parties on either

22. *Cf. United States v. Brady*, 579 F.2d 1121, 1134 (9th Cir. 1978).

side. The Court concluded that while Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, "Congress consistently believed this to be the necessary result of its repeated legislative actions." 435 U.S. at 204.

This pattern was well-established by the time that the United States entered into treaties with the tribes in the State of Washington. Thus, in one provision of the Treaty of Point Elliott, 12 Stat. 927 (1855), the Court noted, the Suquamish Tribe agreed to deliver up offenders against the laws of the United States to the federal authorities for trial. The Court concluded that this provision, read in conjunction with the federal criminal statutes, implied that the Tribe would not try non-Indians. 435 U.S. at 207-208. Since 18 U.S.C. §1152 had already been enacted, it was one of the elements of the Tribe's treaty-acknowledged dependent status that the United States would enforce its laws against non-Indian offenders.

When the Court's analysis is applied to tribal civil and tax authority an opposite conclusion is mandated because of the central fact that the United States has never asserted comprehensive *civil* jurisdiction over transactions between Indians and non-Indians on reservations. Accordingly, despite the tribal dependent status, there is no reason to believe that a corollary surrender of civil and taxing authority has been effected.

A second cornerstone of the Court's opinion in *Oliphant* was its conclusion that although Indian tribes retain elements of "quasi-sovereign" authority, they are prohibited from exercising those powers of autonomous states that are expressly terminated by Congress and "those powers inconsistent with their status." 435 U.S. at 208. The State and

its supporting Amicus Curiae argue that it is inconsistent with tribal status to exercise *any* jurisdiction whatsover over non-Indians on the reservation but do not explain *why* this is so as to exercise of civil or taxing jurisdiction.

In our view, the Court shed considerable light on the meaning of "dependent status" by its statement that

> [u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and *their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.* '[T]heir rights to complete sovereignty as independent nations, [are] necessarily diminished' *Johnson v. M'Intosh*, 8 Wheat. 543, 574 (1823).

435 U.S. at 209. (emphasis added) Thus, the Court explained, their power to dispose of their land to whomsoever they pleased was extinguished as was their power to exercise external political sovereignty in relations with other nations. Both conflicted with the interests of the overriding sovereignty of the United States. With respect to the tribes' relation to non-Indians, however, the critical interest of the United States was stated by the Court as follows:

> [F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from *unwarranted intrusions on their personal liberty.* The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.

435 U.S. at 210. (emphasis added)

Thus, the Court emphasized that the federal government had a strong interest in insuring that its citizens were not

denied the basic guarantees of the Bill of Rights which were then inapplicable to the tribes. *See Talton v. Mayes*, 163 U.S. 376 (1896).[23] In light of the tribes "want of fixed laws [and] of competent tribunals of justice," 435 U.S. at 210, the Court concluded that it was inconsistent with the tribes' status to try and punish non-Indians without regard to the basic constitutional guarantees implicated in a criminal prosecution. The assumption of lack of tribal criminal jurisdiction over non-Indians arose immediately, therefore, and Congress moved to fill the void beginning in 1790 by assuming jurisdiction over crimes by non-Indians on Indian reservations.

In contrast to the grave threat of deprivations of personal *liberty* implicit in the tribal exercise of criminal jurisdiction at that point in our nation's history, an exercise of tribal taxing power or civil authority clearly presents no such threat. Although constitutional problems obviously arise in the tax arena, nevertheless they relate primarily to property rights[24] not "personal liberty" and are thus not so paramount to suggest that it was *per se* implicit in the status of the tribes that such jurisdiction was surrendered.[25] Most exercises of civil jurisdiction simply do not invoke the government's duty of protection to the same degree and

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23. Now, of course, through the Indian Civil Rights Act of 1968, 25 U.S.C. §1301 et. seq., most of the provisions of the Bill of Rights apply to the tribes, and these protections extend to "any person," Indian or non-Indian.

24. In the instant case, of course, given the consensual nature of the trade and tax payment by the non-Indian purchasers, the "property rights" of the taxpayers are greatly attenuated to the extent they are present at all.

25. In a criminal proceeding, on the other hand, given the tribal "want of fixed laws," such guarantees as the freedoms from double jeopardy, cruel and unusual punishment, unreasonable searches and seizures, unreasonable bail and self-incrimination were implicated and the concerns of the sovereign for its citizens correspondingly increased.

consequently Congress never attempted to apply a civil law system governing the relations between Indians and non-Indians in tribal territory.[25] Governance of those relations has instead been left to the tribes.

Indeed, in light of this congressional failure to enact a civil regulatory or taxing system, the lack of state jurisdiction over tribal *territory* decreed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)[26] would have resulted in a governmental vacuum over civil matters were tribal jurisdiction inherently prohibited. In sum, no overriding federal interests are so deeply threatened in an exercise of tribal civil or tax authority to lead to the conclusion that such jurisdiction is inherently prohibited as "inconsistent with [the tribes'] status."

Finally, the Court in *Oliphant* emphasized, after a detailed analysis, that the executive, judicial and legislative branches of our government shared an assumption that the tribes did not possess criminal jurisdiction. 435 U.S. at 197-206. In the few cases in which criminal jurisdiction over non-Indians had been asserted, the Court noted, it had been uniformly rejected (citing *Ex parte Kenyon*, 14 Fed. Cas. 353 (W.D. Ark. 1878), and two opinions of the

25. In the one civil area where Congress did act, in this early period, regarding the licensing and regulation of Indian traders, it never sought to displace tribal authority to tax as it had displaced tribal criminal jurisdiction in the federal criminal statutes. In fact, in *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), this Court strongly implied that the Navaho Tribe could levy a tax on a non-member Indian trader. 380 U.S. at 691. The Court also noted that the regulations promulgated by the Department of the Interior authorized tribal taxes on non-Indian federal traders. 380 U.S. at 689-90.

26. In *Worcester v. Georgia*, the United States Supreme Court held that the State of Georgia could not apply its laws to a *non-Indian* engaged in missionary activities involving Indians on a reservation. At this time, the prohibition on state jurisdiction was territorial. *See* further discussion in Section III B, *infra*.

United States Attorney General issued in 1834 and 1855). Further, the Court stated that lack of tribal jurisdiction to try and punish non-Indians was implicit in its holding in *In re Mayfield*, 141 U.S. 107 (1891), that the general object of congressional statutes was to allow Indian nations criminal jurisdiction over their own members but to "reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." 435 U.S. at 204 quoting from *In re Mayfield*, 141 U.S. at 115-116 (1891).

Congress also shared the assumption that Indian tribes did not have criminal jurisdiction over non-Indians, a fact that emerged from the Court's analysis of the series of amendments to the Trade and Intercourse Acts which restricted federal prosecution of Indians already tried and punished by tribal courts but failed to provide for parallel protection for non-Indians. 435 U.S. at 203.

As Section I A demonstrates, however, the Executive Branch has consistently recognized tribal taxing authority over non-Indians, Congress has ratified it and encouraged its exercise, and this Court has specifically and repeatedly confirmed the existence of tribal taxing authority and civil jurisdiction over non-Indians. *Oliphant* simply cannot be extended to these areas.

C. This Court has repeatedly upheld tribal civil jurisdiction over non-Indians and these authorities have been reconfirmed by this Court after *Oliphant*.

One of the most glaring defects in the analyses of the State and its supporting Amicus Curiae is their assumption that the Supreme Court in *Oliphant* overruled, *sub silentio*, its decisions upholding generally tribal civil jurisdiction over non-Indians. Not only is the reasoning of *Oliphant*

inapplicable to civil and taxing jurisdiction as demonstrated above, but this Court has confirmed its civil jurisdiction decisions after *Oliphant*.

Justice Marshall first referred to tribal authority over non-Indians in 1823. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 593 (1832), he stated:

> The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased, holds their title under their protection, and subject to their laws.

See also Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 538, 540. The leading case, however, is *Williams v. Lee*, 358 U.S. 217 (1959), where this Court held that to allow the State of Arizona to assert jurisdiction over a civil cause of action brought by a non-Indian against an Indian arising out of an on-reservation business transaction would impermissibly interfere with tribal self-government. The tribal court was the *exclusive* forum for resolution of such Indian/non-Indian disputes. The Court held:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there. *Cf. Donnelly v. United States, supra, Williams v. United States, supra.* The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navahos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

358 U.S. at 223. Manifestly, this Court confirmed the jurisdiction of the tribal government over its reservation and held that no exemption from this sovereignty was available for non-Indians in civil matters.

Later cases have not narrowed this principle. In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 179 (1973), this Court stated that the *Williams* "interference with self-government" test was specifically tailored for situations involving non-Indians:

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. [citation omitted] In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

411 U.S. at 179.

In *United States v. Mazurie*, 419 U.S. 544, 558 (1975), this Court described its holding in *Williams v. Lee* as follows:

> *In holding that the authority of tribal courts could extend over non-Indians,* insofar as concerned their transactions on a reservation with Indians, we stated:
>
> > It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.

(emphasis added) Similarly, in *Fisher v. District Court*, 424 U.S. 382 (1976), the Court stated:

> In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); *accord Kennerly v. District Court of Montana*, 400 U.S. 423, 426-27 (1971) (per curiam).

424 U.S. at 386.

Finally, two post-*Oliphant* decisions put to rest Appellants' argument that *Oliphant* signals the termination of tribal civil and taxing powers over non-Indians involved in on-reservation contacts with Indians. Although the State and its supporting Amicus Curiae rely heavily on *United States v. Wheeler*, 435 U.S. 313 (1978), for their contention that exercise of civil jurisdiction over non-Indians is inconsistent with their status, they miss the critical aspect of *Wheeler* — its clarification that *Oliphant* did not overturn the venerable doctrine of Indian affairs that Indian tribes are quasi-sovereign entities which retain essential governmental powers that have not been terminated. Thus the Court stated:

> But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . [They] are a good deal more than 'private voluntary organizations.'" *United States v. Mazurie*, 419 U.S. 544, 557. [citations ommitted] The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. *See Oliphant v. Suquamish Tribe* [435 U.S. at 191].

435 U.S. at 323.[28]

28. The insistance of Amicus Curiae Salt River Project Agricultural Improvement and Power District that *Oliphant* held that "there exists within the United States but two sovereigns," Amicus Brief at 7, is a vast oversimplification. The *Wheeler* holding that Indian tribes are sovereign entities distinct from the United States government for "double jeopardy" purposes, with inherent powers which were never delegated to them by the federal government, makes it clear that there are more than just two "sovereign" entities in our federal system. The tribe is a third sovereign for some purposes, even though its sovereignty is subject to defeasance by the federal government.

Finally, and most importantly, this Court unequivocally reconfirmed its prior decisions concerning tribal civil jurisdiction over non-Indians in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Court stated:

> Tribal courts have repeatedly been recognized as appropriate forums for the *exclusive adjudication* of disputes affecting important personal and property interests of both Indians and non-Indians. *See, e.g. Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee*, 358 U.S. 217 (1959). . . . [other citations and footnote ommitted]

436 U.S. at 65-66. (emphasis added)[29]

In sum, the State's argument that tribal civil and taxing jurisdiction over non-Indians have been limited by *Oliphant* is completely untenable in light of the Court's failure to disturb these authorities in its opinion and because of its subsequent affirmation of tribal civil jurisdiction over non-Indians in *Martinez*.

D. The tribal power to tax non-Indians doing business on the Reservation is an essential attribute of inherent tribal sovereignty, not merely an adjunct of the power to exclude.

In its Brief, the State contends that tribal power to tax, to the extent it exists, is derived from the Tribes' treaty power to exclude non-members of the Tribe from the res-

29. *See also Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, ___ U.S. ___, 58 L. Ed. 2d 740 (1979), where the Court referred to the established rule of construction that ambiguities in federal legislation and treaties affecting retained tribal sovereignty are to be construed in favor of the tribes, ___, U.S. ___, 58 L. Ed. 2d at 758. *See also Bryan v. Itasca Co.*, 426 U.S. 373, 392 (1976); *see generally, McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

In addition, *Santa Clara Pueblo* is significant because of its clear reaffirmation of both the tribal sovereignty doctrine, 436 U.S. 55-56, and the *McClanahan* ruling that Indian tribal sovereignty provides the backdrop against which the applicable federal statutes and treaties must be read in resolving legal disputes involving Indian tribes. 436 U.S. at 60.

ervation, and that the Tribe "may impose terms in a nature of a license or permit fee upon which such permission will be granted." State Br. at 77. It argues that state taxes may be imposed on Indian/non-Indian transactions so long as they do not interfere with this tribal power to exclude.

The argument, although clever, is deficient for several reasons. First, it ignores the established test for the applicability of state laws to non-Indians doing business with non-Indians on the reservation — whether state jurisdiction would interfere with tribal self-government. *See generally Williams v. Lee,* 358 U.S. 217 (1959). A lack of conflict with the tribes' exclusion power is therefore not germane. Second, the argument is founded upon a false premise. Indian power to tax is an essential element of retained tribal sovereignty, recognized and confirmed by the treaties and by subsequent legislation. It is not merely an aspect of tribal power to condition entry of non-Indians to the reservation.

The State relies on *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906), but incorrectly reads the decision. The decision confirms that exclusion is a potential remedy for non-payment of taxes but is not the *source* of the right to tax. As the Court of Appeals stated:

> The authority of the Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. *It was one of the inherent and essential attributes of its original sovereignty.* It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic, it is taken from it. . . . The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek Tribe itself.

135 F. at 950. (emphasis added)

Felix Cohen, in his monumental work, HANDBOOK OF FEDERAL INDIAN LAW 143 (1941 ed.), states, relying on *Buster v. Wright:*

> The power to tax does not depend upon the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the jurisdiction.

As Cohen intimates, tribal taxing power was upheld in *Buster v. Wright* even though Congress had terminated the Tribe's power to remove non-Indians in possession of a lot in its territory; other enforcement mechanisms, however, were still available to the Tribe. 135 F. at 954. Summarizing the nature and origin of the tribal taxing power, Cohen states:

> One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed.

HANDBOOK OF FEDERAL INDIAN LAW at 142. *See also Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89, 99 (8th Cir. 1956), in which the Court of Appeals stated:[30]

> Inasmuch as it has never been taken away from them, the defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sov-

30. *See also Solicitor's Opinion, Powers of Indian Tribes,* 55 I.D. 14, 46 (1934):

> Chief among the *powers of sovereignty* recognized as pertaining to an Indian tribe is the power of taxation. . . .

(emphasis added)

> ereignty. . . . We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, *supra*, that such power still exists.

Notwithstanding its aboriginal origins, this Court has recognized that implicit in the treaties with the tribes was a guarantee of self-government:

> In return for their promises to keep peace this treaty "set apart" for "their permanent home" a portion of what had been their native country, and provided that no one, except United States government personnel, was to enter the reserved area. *Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in* Worcester v. State of Georgia, *was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.*

(emphasis added) *Williams v. Lee*, 358 U.S. at 221-22. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Justice Marshall observed that in various treaties with the Cherokee Nation "the United States of America acknowledged the said Cherokee Nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America, in reference to acts done within their territory. . ." *Id.* at 538-39; *see also id.* at 540.

In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174-75 (1973) the Court stated:

> [T]he reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision.

Moreover, as the Court emphasized in *McClanahan*, 411 U.S. at 180 n. 21, the holding of *Williams* was that

> *absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

358 U.S. at 220 (emphasis by Court). The emphasized phrase, "absent governing Acts of Congress," strongly suggests that tribal self-government rests in the inherent sovereignty of the tribes and in the treaties rather than in congressional statutes.

The Stevens' treaties with the Western Washington Tribes, negotiated in 1854 and 1855, contain language virtually identical to the language held to guarantee tribal self-government in *Williams*.[31] Thus, Article 2 of the Treaty with the Makah of January 31, 1855, 12 Stat. 939 provides:

> There is, however, reserved for the present use and occupation of the said tribe the following tract of land . . . which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or Agent. . . .

Article 2 of the Treaty of Point Elliott, of January 22, 1855,

31. In *Oliphant*, largely because its treaty required the Tribe to "deliver up" non-Indian offenders to the federal authorities, the Tribe was forced to concede that tribal criminal jurisdiction over non-Indians was not protected in the treaties. 435 U.S. at 197. In the instant case, however, the Tribes make no similar concession. Especially in light of *Williams* and subsequent cases, it is clear that the setting aside of the reservations for the exclusive use of the Tribes guaranteed the Tribes the right to govern them. It seems highly probable that the understanding of the Tribes at the time would have been that the Reservations were set aside as their homeland and that non-Indians choosing to enter the reservation would be subject to tribal laws, particularly in light of the treaty provision that non-Indians could reside there only with the permission of the Tribes. This construction makes particular sense in view of *United States v. Winans*, 198 U.S. 371, 381 (1905), which held that the Stevens' treaties were not "a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *See also United States v. Wheeler*, 435 U.S. at 327 n. 24 (1978).

12 Stat. 927, ratified March 8, 1859, to which the Lummi Tribe was a party, is to the same effect.[32] These treaties convey the same general guarantees of tribal sovereignty; there is no suggestion in that they are limited to the power to exclude.

Similarly, in the statutes discused in Section I B, *supra*, ratifying generally tribal powers of self-government, and supporting by implication tribal power to tax, contain no indication that the tribal power is restricted to a power to condition entry to the reservation. In determining the validity of the imposition of the state tax, therefore, this Court should look not to whether it conflicts with a tribe's power to exclude non-Indians, but rather to whether it interferes with tribal self-government in violation of this

32. The Colville Reservation was set aside by Executive Order in 1872, and not by treaty. Nevertheless, this makes no legal difference with respect to the status of the tribal government. Congress has repeatedly recognized the Colville Confederated Tribes as a tribe with governmental powers like other tribes and has likewise recognized the Colville Business Council as the governing body of the tribe. *See* Public Law 84-772, 70 Stat. 626 (1956); Public Law 87-24, 75 Stat. 45 (1961); Public Law 87-298, 75 Stat. 639 (1961); Public Law 90-278, 82 Stat. 69 (1968).

Further, in 1965, two bills were before Congress contemplating termination of the Tribe, which would have ended certain aspects of tribal government. In particular, §19 of H.R. 6925, 89th Cong. 1st Sess. (1965) and §18 of S. 1413, 89 Cong. 1st Sess. (1965) provided that all tribal powers conferred on the Tribes by their Constitution which were inconsistent with the provisions of the Act were to be terminated. Although the termination bill never became law, the proposed provisions indicate a congressional recognition that the Tribe possesses those governmental powers set out in its Constitution, absent termination.

Since Congress has not distinguished between treaty, statutory, and executive order reservations for purposes of federal policy, it would make little sense to create such a distinction here. A more reasonable construction would be to hold that in setting aside a "reservation," whether done by executive order, or statute, the basic general doctrines of Indian law, including those regarding tribal sovereignty, shall apply. As this Court stated in *Antoine v. Washington*, 420 U.S. 194, 203 (1975), regarding the Act of 1871 which resulted in the termination of the federal power to enter into treaties with Indian tribes:

> This meant no more, however, than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty.

Court's holding in *Williams v. Lee* and in conflict with the federal policies implemented by these statutes and treaties.

A holding by this Court that would deny Indian tribes the power to tax non-Indians doing business on the reservation, on the other hand, would effectively emasculate the tribal governments in this state and elsewhere. It would give non-Indians carte blanche to take advantage of the human and natural resources on the reservation, but deny the tribal governments the necessary power and revenue to function as viable governments.

As this Court made clear in *Williams v. Lee*, when the Reservations were set aside as a homeland for the Tribes, reserved for their "exclusive use" and in which non-Indians could enter only with the permission of the Tribes, the treaties implicitly guaranteed the Tribes the right to govern their Reservations subject only to the supervisory powers of Congress. These same principles have been furthered by Congress and by the Executive Branch; Congress has done nothing to terminate these general tribal civil powers and tribal powers to tax in particular. If this Court were to accept the invitation of the State and its supporting Amicus Curiae to hold that non-Indians may enter the Reservation totally free from the application of tribal civil laws, the promise of a homeland set aside for the exclusive use of the Indians, and subject to their governance, would be rendered nugatory. In light of those promises and the consequent Indian expectations, the prospect advocated in the Brief of Amicus Curiae Salt River Agriculture Improvement and Power District, for example, that a $600,000,000 coal-fired electric generation plant," Amicus Brief at 2, could be located on an Indian reservation but be totally immune from tribal law is patently offensive.

II. Imposition of the State Cigarette Tax on the Tribally Taxed Sales on the Reservation Would Constitute An Egregious Interference With Tribal Self-Government Prohibited by Federal Law.

A cornerstone of the District Court's opinion was its conclusion that imposition of the state tax on the tribally taxed and operated sales would directly and substantially interfere with the exercise of tribal government. Based on the existence of the tribal tax, the District Court concluded that *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), was distinguishable. In *Moe,* Montana's requirement that an individual Indian seller collect a tax imposed on non-Indians was held to be a minimal burden which did not frustrate tribal self-government within the meaning of *Williams v. Lee,* 358 U.S. 217, 223 (1959), or contravene any congressional enactment dealing with the affairs of reservation Indians.

At the threshold, the Appellee Tribes would dispose of the State's argument that *Moe* is indistinguishable from the instant case because of the presence there of an "administrative fee." State Br. at 87-88. The Supreme Court did not even *mention* the administrative fee in its opinion, and the District Court stated:

> The Council controls the purchase of cigarettes for resale by tribal members and charges an administrative fee in connection therewith. Although the tribes were authorized by their constitution to tax, *the tribes have not imposed any tax on the cigarettes sold in the smokeshops.*

Confederated Salish and Kootenai Tribes v. Moe, 392 F. Supp. 1297, 1313 (D.Mont. 1975). (emphasis added)

Similarly, the Tribes' Brief in *Moe*, after acknowledging that the Tribes charged an administrative fee, stated:

> The Tribes are authorized by their Constitution to tax cigarette sales within the Reservation, but they have not done so to date.

Tribes' Brief at 10. The Tribes also argued:

> *[I]f* the Tribes ever seek to exercise their tribal constitutional authority to impose a tribal cigarette sales tax on the merchandise, they would be seriously disadvantaged, for their tribal retailers would be forced to collect not only the tribal tax but the state tax as well. Recognition of this fact is a deterrent to the Tribes' imposing their own tax, which would preclude raising much-needed revenue.

Id. at 23-24. (emphasis added) Not only was there no tribal tax in *Moe,* but the record discloses no comprehensive pattern of regulation by the Tribe. While the United States District Court for Montana noted that the tribal council controlled the purchase of cigarettes for resale by tribal members, 392 F. Supp. at 1313, there is no indication that the sale itself was controlled or regulated by the Tribe. As the District Court summarized below:

> In *Moe,* the cigarettes at issue were sold by individual Indians operating businesses and not by tribal enterprises. There was no indication that the sales of cigarettes were tribally financed, managed or regulated. Although the tribe apparently charged an administrative fee, no tribal tax was imposed on the cigarettes sold in the smoke shops and the tribe itself received no direct benefits from the cigarette sales upon which it depended as a source of revenue for tribal programs. Thus, in the absence of any direct involvement by the tribe, the Court concluded that there was no interference with tribal self-government.[33]

446 F. Supp. at 1364, J.S. App. at 39-40.

In contrast, the District Court concluded that in this case the *Tribes* themselves were directly involved in the

33. The negative implication of the Court's statement in *Moe* that there was no interference with tribal self-government, of course, is that the state tax would have been stricken had the Court found such an interference.

conflict with the State, a conclusion specifically grounded upon the stipulated facts of the Pre-Trial Order. The taxing ordinances of the Appellee Tribes stand in vivid contrast to the lack of tribal involvement in *Moe*. As opposed to *Moe's* "administrative fee," the tribal cigarette taxes are substantial and an essential part of the funding of many tribal programs. As the District Court noted:

> For example, from 1972 through 1976, . . . the Colville Tribe, earned approximately $265,760 from its cigarette tax while the Lummi and Makah Tribes earned $54,440 and $13,490, respectively . . .

446 F. Supp. at 1347, J.S. App. at 7.

Moreover, as the District Court emphasized, the tribal ordinances are exercises of police as well as taxing power. Each ordinance provides that tobacco products, including cigarettes, shall remain the property of the Tribe until ultimately sold, requires the tribal outlet operator to obtain both tribal and federal traders licenses as well as adequate personal and property liability insurance, prohibits sales of tobacco products to minors, and restricts the numbers of cartons of cigarettes that can be sold to non-Indians to three cartons. Penalties are set forth in the ordinances for violations. 446 F. Supp. at 1347-48, J.S.App. at 7-8. As the District Court summarized:

> In short, each ordinance reads as a comprehensive scheme for the licensing, regulation and taxation of the sale of cigarettes on the reservation.

446 F. Supp. at 1348, J.S. App. at 8.

Further, in *Moe* there was no showing that imposition of the state tax would have any impact on the *Tribes* whatsoever. In the instant case, on the other hand, the determination of whether the imposition of the state tax will impermissibly interfere with tribal self-government

must be made in the following factual context:

> The State tacitly concedes the Tribes' source of cigarette tax revenue would dry up if they were forced to add the State tax to the cost of their cigarettes. The facts dictate that the taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and the cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus, each Tribes' ability to fund its sponsor programs would suffer substantial interference.

446 F. Supp. at 1347, J.S. App. at 7-8.

> The impact of superimposing the State's cigarette tax on the tribal taxes has already been discussed in this opinion. However, it bears repeating that at least with regard to a commodity as highly price elastic as cigarettes, the result will be the depletion of an already limited tribal tax base, probable destruction of the tribal enterprises and elimination of essential revenues needed for tribally sponsored programs.

446 F. Supp. at 1362-63, J.S. App. at 37.

The court ultimately concluded that "a restriction of the State's taxing power in this case is justified by proof of an actual interference with, if not destruction of, the Tribes' ability to carry out their tax financed self-governing functions." 446 F. Supp. at 1365, J.S. App. at 41. In these circumstances the state tax cannot be sustained.

In *Williams v. Lee*, 358 U.S. 217 (1959), the Court considered the question whether a non-Indian licensed by the federal government as a federal trader could sue an Indian in state court on a debt arising out of commerce on the reservation. The Court noted that the basic policy of immunizing Indians from state law had persisted since *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), in which the Court had stated that state laws could have *no* applica-

tion on Indian reservations and that the whole intercourse between the United States and Indian Nations was committed to the federal government. 31 U.S. (6 Pet.) at 559-561. The Court noted that the *Worcester* principles had been modified by the Court over the years in cases "where essential tribal relations were not involved," 358 U.S. at 219, but that the basic policies of *Worcester* remained. The Court summarized:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. *Cf. Utah and Northern R. Co. v. Fisher*, 116 U.S. 28 [1885]. . . . Congress has also acted consistently upon the assumption that the states have no power to regulate the affairs of Indians on a reservation.[34]

Id. at 220. In addition, referring to the 1868 Treaty between the Navajo Nation and the United States, the Court stated:

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34. The Court's citation of *Utah and Northern Railway* is especially significant in light of the State's reliance on the case for the proposition that "states have historically been permitted to tax non-Indians owning property on Indian Reservations or engaged in economic transactions with reservation Indians." State Br. at 61. However, in *Utah and Northern Railway*, the Court held only that imposition of a state tax on a railroad located on a reservation, which had no direct relation to the Tribe, was lawful. As the Court stated:

> To uphold that jurisdiction [of the territory] in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the Treaty stipulations, and might thus defeat provisions designed for the security of the Indians. But it is not necessary to insist upon such general jurisdiction for the Indians to enjoy the full benefit of the stipulations for their protection. The authority of the Territory may rightfully extend to all matters not interfering with that protection. . . . If the Plaintiff lawfully constructed and now operates a railroad through the Reservation, it is not perceived that any just rights of the Indians under the Treaty can be impaired by taxing the road and property used in operating it.

116 U.S. at 31-32. Similarly, *Thomas v. Gay*, 169 U.S. 264 (1898), also relied upon by the State, involved no interference whatsoever with the Tribe or with the rights of Indians.

> Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.

358 U.S. at 221-22. The Court concluded:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence *would infringe on the right of the Indians to govern themselves*. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.

358 U.S. at 223. (emphasis added)

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), this Court clarified that the *Williams* self-government test was specifically tailored for situations like this one where both a state and a tribe seek to apply their laws to an on-reservation transaction involving both Indians and non-Indians:

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. [citations omitted] In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

411 U.S. at 179. *See also* the decision below, 446 F. Supp. at 1364, J.S. App. at 39. Similarly, in *Fisher v. District Court*, 424 U.S. 382 (1976), the Court observed:

> In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on "whether the state action infringed on the

> right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); *accord, Kennerly v. District Court of Montana*, 400 U.S. 423, 426-427 (1971) (per curiam). Since this litigation involves only Indians, *at least the same standard must be met before the state courts may exercise jurisdiction.* [citations omitted]

424 U.S. at 386. (emphasis added) To the same effect is *United States v. Mazurie*, 419 U.S. 544, 554 (1975).

Finally, this Court recently confirmed in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that the *Williams* test was intended to apply to situations involving both Indians and non-Indians. The Court cited *Williams* and *Fisher* for the proposition that

> [t]ribal courts have repeatedly been recognized as appropriate forums for the *exclusive* adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

436 U.S. at 65. (emphasis added)

Given that this is the type of dispute for which the *Williams* interference with self-government test was specifically designed, the question then becomes whether in distinction to *Moe*, application of the state tax in this case will impermissibly interfere with tribal self-government.

This determination should not be made in the abstract, but rather based on realistic expectations. As a practical matter, the Tribes would emphasize that tribal governments, like other governments generally, can only survive through their ability to raise revenues in order to finance essential governmental programs; in the case of the Tribes, however, the problems ordinarily facing units of local government are aggravated by the poverty of the Indians and the lack of an adequate tax base.

The indigency of Indians and their tribal governments,

and the economic problems faced generally on reservations are well-documented. In the FINAL REPORT OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION submitted to Congress on May 17, 1977, the Commission noted:

> [F]or the most part, Indian reservations remain underdeveloped and Indian people lack credit, remain poor, uneducated and unhealthy. From the standpoint of personal well-being the Indian of America ranks at the bottom of virtually every social statistical indicator. On the average he has the highest infant mortality rate, the lowest longevity rate, the lowest level of educational attainment, the lowest per capita income and the poorest housing and transportation in the land.

Id. at 7. *See also id.* at 91-94, 347-50. Reservations also lack the physical infrastructure such as transportation systems, power, water and communications systems which are necessary for economic development. *See id.* at 354-58.

The problems facing Indians generally throughout the United States exist in the State of Washington as in other areas. In its report to the Washington State House of Representatives entitled THE LEGAL RELATIONSHIP BETWEEN WASHINGTON STATE AND ITS RESERVATION - BASED INDIAN TRIBES (August 31, 1978), the State's Office of Program Research noted:

> While the number of Washington's Indians may have increased in the past 100 or so years, it is a fact that the Indians living in Washington today suffer from a standard of living far inferior to that of the state's non-Indian population. Task force reports prepared under the auspices of the Governor's Indian Advisory Council show that in terms of health care, life expectancy, educational level achieved, unemployment, alcoholism, suicides and a host of other indicators of standard of living, the state's Indian population lags far behind its non-Indian population.

Id. at 12. The report notes that there is an average unemployment rate of 42.5% among Indians living on or near

reservations in the State, *id.* at 19, and that the unemployment rate on the Colville Reservation was 57.8%, *id.* at 25, on the Lummi Reservation, was 55%, *id.* at 29, and on the Makah Reservation, was 27.2%, *id.* at 30.[35]

As the District Court noted, each of the Reservations involved in this litigation is isolated and underdeveloped, and most essential goods and services are located off the Reservations. 446 F. Supp. at 1346, J.S. App. at 4. Each of the Reservations has "an already limited tribal tax base." 446 F. Supp. at 1362, J.S. App. at 37. The limited tax base occurs not only because of the indigency of the Indians living on the reservation, but also because about 78% of the land located on reservations in the State of Washington is held in trust status and is therefore tax exempt. *See* OFFICE OF PROGRAM RESEARCH, *supra*, at 14.

The point that the Tribes would emphasize is that the survival of the fragile tribal governments throughout the United States will be as effectively compromised by a holding that the states can superimpose their taxes on tribal taxes as by a holding that the tribes lack power to tax in the first instance. As illustrated by this case, if the states can superimpose their taxes on tribal taxes that are enacted, any business taking place on the reservation will bear a total tax burden greater than off the reservation, and a strong incentive will be provided for non-Indians to do business elsewhere. From the Tribes' perspective, therefore, there can be no peaceful coexistence between state and tribal taxation of on-reservation transactions between Indians and non-Indians; imposition of state taxes will preempt the Tribes' practical, if not legal, ability to tax. If the Tribes are ever to achieve economic self-sufficiency, attrac-

35. *See also* 446 F. Supp. at 1346, J.S. App. at 5.

tion of non-Indian business to the reservations is essential. In light of the stipulated facts and these practical realities, the Appellee Tribes believe it indisputable that imposition of the state tax will substantially interfere with tribal self-government.

In its Brief at 69, the State concedes that

> [t]he district court found that loss of this revenue source would result in depletion of the tribal tax base, destruction of the tribal cigarette enterprises, and elimination of essential revenues needed for tribally sponsored programs.

The State's attempts to argue that nevertheless the state taxes would not interfere with self-government are not persuasive.

The first problem with the State's analysis is that it attempts to argue that the *Williams* test prohibits only exercises of state jurisdiction that threaten to *destroy* the self-governing ability of the Tribes:

> No one claims that the Tribe will be unable to govern their members if they cannot raise revenues by selling cigarettes to non-Indians.

State Br. at 69.

> [E]limination of this revenue source could well reduce the amount of revenues that the Tribe could spend elsewhere, but it can hardly be said to *actually* threaten the self-governing ability of the Tribe.

Id. at 70. But that, of course, is not the test. In *Williams* the Court stated that the test was whether the imposition of state law would "infringe on the right of Indians to govern themselves." 358 U.S. at 223. In *McClanahan*, the Court stated that the state could protect its interest over non-Indians by asserting its jurisdiction only "up to the point where tribal self-government would be *affected*." 411 U.S. at 179. (emphasis added) Clearly there was no showing in

either *Williams* or *Fisher*, both of which voided state jurisdiction, that the tribal government would have been destroyed. In fact, in *Williams*, the interference with self-government struck down by the Court was simply an "undermining" of the authority of tribal courts. 358 U.S. at 223. In *Fisher v. District Court*, application of state law was disallowed because it "would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves." 424 U.S. at 387-88.

In contrast, the interference found by the District Court, that imposition of the state tax would destroy the tribal enterprises and tax systems and interfere with the ability of the Tribes to perform essential governmental services, is clearly more substantial. The interference is direct, comprehensive, and ultimately ruinous.

In these circumstances, the District Court obviously applied the *Williams* test in a scrupulously limited manner. It held:

> [T]he Tribes have the burden of establishing that a challenged State regulation "frustrates tribal government," *see Williams v. Lee*, 358 U.S. 217, 219-220 (1959), or runs afoul of any congressional enactment dealing with the affairs of reservation Indians, *United States v. McGowan*, 302 U.S. 535, 539 (1938).

446 F. Supp. at 1356-57, J.S. App. at 25, citing *Moe*, 425 U.S. at 483. In addition, the court specifically refused to hold that a merely theoretical conception of interference with tribal government was sufficient to invalidate the tax:

> [W]hat the courts must avoid is utilizing the *Williams* test to strike down such state regulation based on "merely theoretical conceptions of interference with the function of [tribal] government." In other words, if a tribe has proved and/or a state concedes that the state regulation causes actual interference with the performance of the governmental obligations, the courts must, consistent with *Williams*, strike the regulation down.

446 at 1363-64, J.S. App. at 39. The court also found that an indirect economic impact was insufficient to void a state tax, 446 F. Supp. at 1364, J.S. App. at 39, but held:

> [A] restriction of the State's taxing power in this case is justified by proof of an actual interference with, if not destruction of, the Tribe's ability to carry out their tax financed self-governing functions.

446 F. Supp. at 1365, J.S. App. at 41.[36]

In light of the fact that the Tribes have enacted a comprehensive regulatory scheme, 446 F. Supp. at 1348, J.S. App. at 8, the State's assertion that imposition of the state tax will have a *merely economic effect* on the Tribes, State Br. at 69-70, is unwarranted. Nevertheless, even this concession by the State is critical in light of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In its Brief at 69, the State concedes that it does not dispute that imposition of the State tax will "discourage, if not entirely eliminate" the tribal enterprises. The State also concedes that imposition of the state tax "will have a negative impact upon Tribal revenues available for expenditure on Tribal programs." *Id.* In *Santa Clara Pueblo*, the Court stated that such a financial burden interfered with a congressional goal of protecting tribal self-government:

> Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it

36. The substantiality of the interference clearly distinguishes this case from the authorities relied upon by the State. State Br. at 64. Thus in *Fort Mojave Tribe v. County of San Bernadino*, 543 F.2d 1253, 1258 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), the court described the impact as "an indirect economic burden." *Accord Mescalero Apache Tribe v. O'Cheskey*, 439 F. Supp. 1063, 1073 (D.N.M. 1977). Moreover, these cases seem to have "watered down" the *Williams* test and their correctness is open to question.

> might be in securing compliance with §1302, plainly would be at odds with the congressional goal of *protecting tribal self-government*. Not only would it undermine the authority of tribal forums, [citing its earlier discussion of *Williams* and *Fisher*] but it would also *impose serious financial burdens on already "financially disadvantaged" tribes*. [citation omitted]

436 U.S. at 64. (emphasis added) The Court's statement is an explicit repudiation of the contention made here by the State that an economic impact does not interfere with tribal self-government. Such a financial burden is no less violative of the *Williams* test than of congressional policies protecting self-government. *See* Section III C, *infra*.

Not only must the State's characterization of the lack of interference with the tribal governments be rejected, but so also its repeated efforts to label the tribal tax system as an attempt to "market a tax exemption for non-Indian citizens of the State of Washington." State Br. at 79. The District Court responded to this argument, as to the State's argument that the Tribes were creating a tax haven, by pointing out that

> there is no preemption absent tribal taxation, and to the extent the Tribes impose their tax, there is no tax haven.

446 F. Supp. at 1362, J.S. App. at 25. Whatever applicability the State's characterization might have had to the facts in *Moe*, in the instant case, where the tribal taxes are imposed on all sales of cigarettes on the Reservations, it is entirely clear that no tax haven exists.[37] Further the rationale for invalidating the State tax has nothing to do with

37. Indeed, since the tribal tax is imposed on *all* sales of cigarettes, including those to Indians, *no* tax immunity exists even for Indians. In imposing the tribal tax, in effect, the Tribes have required their members to surrender their tax immunities to the tribes since, as *Moe* makes clear, absent tribal taxation there would be no taxation of Indians at all given the State's inability to tax Indians on a reservation.

Indian immunity from state taxation; state law is inapplicable because it interferes with tribal government.

In addition, the Appellee Tribes would reemphasize that the tribal ordinances constitute a comprehensive regulatory scheme. Imposition of state law upon these transactions is a violation of self-government not only because of its extreme financial impact on the Tribes and on the Tribes' ability to carry out government functions, but also because it has the same substantive interference with the governmental authority of the Tribes over their Reservations that this Court struck down in *Williams* and *Fisher*. These tribal ordinances are not merely tax raising enactments, but they are also regulatory measures that cover all aspects of commerce in cigarettes on the Reservations. Indeed, taxes in general are not merely revenue raising measures, but also important instruments of governmental policy. Taxes can be designed to have strong distributive functions and they may be utilized to condition or control the rate of growth or determine the areas in which the growth takes place.[38] Indian reservations are particularly in need of the tools provided by various tax measures because of their underdevelopment and their vulnerability to exploitation by well-financed off-reservation entrepreneurs. The states, consistent with *Williams, McClanahan* and *Fisher*, cannot be allowed to disrupt the implementation of these policy decisions on Indian reservations, decisions committed by federal law to the governance of the tribes.

Finally, in determining whether the State has impermissibly interfered with tribal self-government, the Appellee

38. Similarly, it is a common feature of state tax programs to set lower tax rates relative to surrounding states in order to encourage business or industry to locate in that state. Indian tribes should not be denied the same instruments of policy which are commonplace among the states.

Tribes suggest that the criteria utilized by the Court in support of its conclusion in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the amendments to the Fair Labor Standards Act unconstitutionally interfered with state sovereignty, are entirely applicable here. They are quite helpful in applying the the *Williams* test.[39]

In *National League of Cities*, this Court granted jurisdiction in order to consider whether a series of amendments to the Fair Labor Standards Act, which applied the minimum wage and maximum hour protections of the Act to state and local governments, "intrude upon the States' performance of essential governmental functions." 426 U.S. at 839. In its decision, the Court emphasized that Congress could not exercise its power in a fashion that "impairs the States' integrity or their ability to function effectively in a federal system." 426 U.S. at 843, citing *Frye v. United States*, 421 U.S. 542, 547 n. 7 (1975). The Court noted that the federal law would have a "significant impact on the functioning of the governmental bodies involved" and might require a "forced relinquishment of important governmental activities." 426 U.S. at 847. It held that the 1974 amendments "will impermissibly interfere with the integral governmental functions of these bodies" and would leave little of the States' "separate and independent existence." 426 U.S. at 851. The Court concluded that Congress lacked

39. Interestingly, *National League of Cities* was decided ten days after *Bryan v. Itasca County*, 426 U.S. 373 (1976). This is significant in light of the parallels between the *National League of Cities* protection for state governments and *Bryan's* strong language about preservation of tribal government. In *Bryan*, the Court noted that Public Law 83-280 was not designed to undermine or destroy tribal government and convert the affected tribes to little more than private voluntary organizations. 426 U.S. at 388-89. The Court emphasized that Public Law 83-280 contained no grant of jurisdiction over the tribes themselves and held that Congress contemplated the continued vitality of tribal government.

power to "devour the essentials of State sovereignty." 426 U.S. at 855.

These considerations are directly applicable to the case before the Court except, of course, that it is the State impairing the ability of the Tribes to function as governments rather than the United States interfering with the prerogatives of the states. The governmental interference implicit in the State's levy and collection of its taxes, however, would be no less severe. Imposition of state taxes will, as a practical matter, totally destroy the ability of the Tribes to tax the same transactions. Indian tribal governments, like other governments, simply cannot function in a fiscal vacuum, and superimposition of the state taxes in this case will seriously interfere with the integrity of tribal governments and their ability to function in our system. Moreover, substitution of state law for that of the Tribes to govern these transactions in Indian commerce on the Reservations, directly infringes upon the right of the Tribes to be governed by their own substantive laws. Such fundamental and far reaching interferences with tribal self-government cannot be squared with this Court's decisions in *Williams*, *McClanahan*, *Fisher* and *Santa Clara Pueblo*.

III. The Application of the State Cigarette Excise Tax to the Tribal Enterprises Has Been Preempted by the Relevant Treaties and Statutes Which Guarantee Tribal Self-Government.

Introduction[40]

Article I, §8 of the Constitution provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian

40. Counsel wishes to acknowledge the assistance of Professor Robert Clinton in the research and drafting of Section III of this brief.

Tribes." It has been well-established since the middle of the 19th century that the Commerce Clause has two aspects: it is not only a grant of power to the federal government, but also a limitation on the power of the states. *See e.g. Cooley v. Board of Wardens of the Port of Philadelphia,* 53 U.S. (12 How.) 299 (1851); *Japan Line, Ltd. v. County of Los Angeles,* ..... U.S. ....., 60 L.Ed. 2d 336 (April 30, 1979). Thus, this Court recently observed in *Hughes v. State of Oklahoma,* ..... U.S. ....., 60 L. Ed. 2d 250, 255 (April 24, 1979):

> The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation.

As Justice Jackson observed in *H.B. Hood and Sons, Inc. v. DuMond,* 336 U.S. 525, 534-35 (1949):

> The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.

The constitutional grant of power to Congress to "regulate Commerce with the Indian Tribes" has been frequently cited as a source of the "plenary" power of Congress over Indian affairs. *See e.g., McClanahan v. Arizona Tax Commission,* 411 U.S. 164, 172 n. 7 (1973); *United States v. Mazurie,* 419 U.S. 544, 554 (1975); *Williams v. Lee,* 358 U.S. 217, 219 n. 4 (1959). In *United States v. Forty-Three*

Gallons of Whiskey, 93 U.S. 188, 194 (1876), this Court likened the grant of power to that over foreign commerce:

> Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes — a power as broad and free from restrictions as that to regulate commerce with foreign nations.

See also United States v. Holliday, 70 U.S. (3 Wall) 407, 417-18 (1865).

This Court, however, has had less occasion to explicitly mark out the "negative implications" for state power which necessarily flow from the Indian Commerce Clause. Nevertheless, the decisions of this Court over the past century and a half demonstrate that the Clause, no less than the Interstate and Foreign Commerce Clauses, does impose substantial restrictions on state power. *See* Section III B., *infra.* As this Court noted in *Rice v. Olson,* 324 U.S. 786, 789 (1945), "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."

Although there is no longer any blanket constitutional exemption that absolutely prohibits all state law from applying on the reservation, at least if it does not affect tribal self-government or any rights of individual Indians, *see Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 483 (1976), core protections from the Indian Commerce Clause have been carefully preserved. The history surrounding the execution of the Indian Commerce Clause indicates an even stronger perception by the Founding Fathers of the need to exclude the states from regulating "commerce with the Indian tribes" than from regulating interstate or foreign commerce. In this case, since the State is attempting to tax on-reservation sales by tribally-operated and taxed enterprises to non-Indians, an explicit

inquiry into the meaning of the Indian Commerce Clause is called for; after all, the State is attempting to tax directly the very core of the subject matter of that Clause — commerce with the Indian tribes.

Two central "negative implications" necessarily flow from the Indian Commerce Clause: first, the Clause was designed to federalize the political and economic relations with the *tribes*, to the exclusion of the states. A state tax assessed on commerce with the tribal enterprises, which directly impairs the government of the reservations, is therefore prohibited. *See* Section III A, *infra*. Second, at an absolute minimum, states may no more discriminate against Indian commerce than against foreign or interstate commerce. State taxes, which, in combination with tribal taxes, impose a cumulative burden on Indian commerce greater than that borne by off-reservation commerce cannot be sustained. *See* Section IV, *infra*.

The Tribes will also dispose of the State's contention that this Court's statement in *Moe* concerning the lack of any "automatic" constitutional exemption, 425 U.S. at 481 n. 17, forecloses this inquiry into the constitutionally implied restraints on state power. The Court's statement in *Moe* was rendered in a context involving neither discrimination against Indian commerce nor infringement on tribal government. Notwithstanding the lack of any automatic constitutional exemption for Indians generally, a constitutional violation is shown when a tribe demonstrates either discrimination against Indian commerce by state law or state impairment of the political and economic relations of the tribal governments themselves.

Finally, this section examines the federal statutes which carry out the policies underlying the constitutional federalization of relations with the tribes; it demonstrates that in light of the specific statutes confirming and advancing tribal self-government as implemented in these federally-approved tribal ordinances, state taxation of the same transactions is preempted.

A. The Indian Commerce Clause was intended to federalize the political and economic relations with the Tribes to the exclusion of the states.

The history behind the adoption of the Indian Commerce Clause and contemporaneous documents strongly indicate that the Clause was intended to nationalize political and economic relations with the Indian tribes and preempt state authority over those relations. This central theme pervades the evolution of the commitment of powers over Indian affairs to Congress.

The documents surrounding the drafting of the Clause reveal a well-focused concern over the particular language of the Articles of Confederation, which granted Congress the "sole and exclusive right and power of regulating the trade and managing all affairs with the Indians not members of any of the States," but subject to the proviso that "the legislative right of any state within its limits not be infringed or violated." The proviso was interpreted by several states to sanction their own independent regulation of relations with tribal governments. In the Constitutional Convention, however, the view that regulation of relations with the tribes belonged to the national government, not the states, prevailed. In the Indian Commerce Clause, therefore, as it finally emerged from the Convention, the qualifications in the Articles were deleted and specific reference made to commerce with the "Indian *Tribes*." These changes, coupled with the recognition in Article VI of the suprem-

acy of the treaties already made with the tribes, indicate a large measure of constitutional protection for essential *tribal* relations.

The perceived need for uniform national power to govern relations and trade with Indian tribes dates back to the colonial period and is even more firmly grounded historically than national control of interstate and foreign commerce. *See generally,* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS, Ch. 1 (1962). In 1754 at the Albany Congress, Benjamin Franklin drafted a "Plan of a proposed Union of the several Colonies" which committed to a proposed national government many important powers over Indian affairs, including the power to "hold or direct all Indian treaties," the power to "make peace and declare war with the Indian Nations," and the power to "make such Laws as they judge necessary for the regulating of all Indian trade." 6 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 889, 890 (O'Callaghan ed. 1885) (hereinafter "N.Y. COL. DOC."). Simultaneously and independently, the English Board of Trade proposed to the Crown a plan of general concert among the Colonies explicitly designed to put Indian affairs under a single direction.[41] *Id.* at 903-06. Both proposals arose from

41. Beginning in 1755, the British government implemented these proposals by centralizing the control of Indian affairs in officials directly responsible to the Crown. *Id.* at 11-23. For example, in the Proclamation of 1763, the Crown imperialized the control of land cessions from the Indians, a matter formerly left to colonial authorities, by establishing a temporary line of demarcation for future non-Indian settlement, and directing that all applications for Indian land cessions and patents be forwarded to England. *Id.* at 20. *See also,* DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA *1759-1791,* 119-123 (Short and Doughty, eds. 1907) (text of Proclamation of 1763). In 1764 the Board of Trade proposed a plan to establish an imperial department of Indian affairs and to put "the regulation of Indian Affairs, both commercial and political throughout all North America, upon one general system, under the direction of officers appointed by the Crown, *so as to put aside all*

the failure of the colonies to implement severally a successful Indian trade policy and the consequent alienation of Indian tribes. *See* PRUCHA, *supra,* 9-11 (1962).

Thus, before the Revolution, both the Colonists and the Crown recognized and supported the need for unified national management of Indian affairs. Subsequent events in the period between the Revolution and the adoption of the Constitution solidified this perception and enhanced the desire of the Framers to protect constitutionally the relationship between the tribes and the national government from state interference. In this vulnerable period of our history, given the hostilities with Great Britain, the United States was particularly anxious to promote friendly relations with the tribes, and in 1775, the Continental Congress inaugurated a federal policy designed to promote that end.

local interfering of particular Provinces, which has been one great cause of the distracting state of Indian affairs in general." 7 N.Y. COL. DOC. 634-36, 637-41. (emphasis added)

Another ilustration of the attitude of the Crown is found in a pre-Revolution dispute between the colony of Connecticut and the Mohegan Indians. *See* J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS, 442 et. seq. (1950). One of the procedural issues concerned whether the dispute should be heard by the colonial courts of Connecticut or by a royal commission, the latter having authority in disputes involving British subjects and a sovereign nation. *Id.* at 428. The dispute involved title to land formerly held by the Mohegan Indians. Regarding the issue of its jurisdiction, the Commission ruled, according to Smith

> that the Indians were distinct people, that the property of the soil was in the Indians, and that royal charters did not *ipso facto* impropriate lands therein to subjects until fair and honest purchases thereof were made from the natives. *A dispute as to property and lands between a distinct people and English subjects could not be determined by the laws of England, but only by a law equal to both parties, the law of nature and nations.* And it was upon this foundation that these commissions had been most properly issued.

Id. at 434. (emphasis added) Ultimately the decision of the Royal Commission was affirmed. *Id.* at 442. The point here emphasized is the rejection of the argument advanced by Connecticut that the dispute ought to be heard by colonial courts.

PRUCHA, *supra*, at 27. *See generally*, W. MOHR, FEDERAL INDIAN RELATIONS 1774-1788 (1933). These policies were carried over into the Articles of Confederation.

In Article IX of the Articles of Confederation, the Congress was expressly granted "the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its limits be not infringed or violated . . . ." The uneasy and ambiguous compromise reflected in the two provisos of Article IX plagued the efficient regulation of Indian affairs throughout the period of the Articles of Confederation. Three states, Georgia, North Carolina, and New York claimed power to regulate economic relations with the Indian tribes during this period. Georgia even attempted to negotiate a treaty with the tribes. These states predicated their assertions of state authority on the claim that the Indian tribes within their boundaries were "members" of the state, and therefore subject to state, not federal authority.[42]

State assertions of political and economic authority over independent Indian tribes met with substantial resistance from the nationalists during this period. James Madison, who was later the moving force in proposing the Indian Commerce Clause, disputed the state claims to authority over the independent Indian tribes in a letter to James

42. Evidence of the basis for the state's assertion of authority over certain Indian tribes is found in a treaty of November 12, 1785 between a rump delegation of the Creeks and the State of Georgia, negotiated after federal treaty commissioners present at the same treaty conference ended their deliberatings due to insufficient tribal participation. 1 AMERICAN STATE PAPERS; INDIAN AFFAIRS, 16-17 (1832). Article I of this treaty provides, "[t]he said Indians, for themselves and all the tribes or towns within their respective nations, within the limits of the State of Georgia, have been, and now are, members of the State of Georgia." *Id.* at 17. The provision was apparently added at Georgia's insistence.

Monroe dated November 27, 1784:

> The federal articles give Congs. the exclusive right of managing all affairs with the Indians not members of any State, under a proviso, that the Legislative authority of the State within its own limits be not violated. By Indian[s] not members of a State, must be meant those, I conceive who do not live within the body of the Society, or whose Persons or property form no object of its laws. In the case of Indians, this description, the only restraint of Congress, is imposed by the Legislative authority of the State. If this proviso be taken in its full latitude, it must destroy the authority of Congress altogether, since no act of Congs. within the limits of a State can be conceived which will not in some way or another encroach on the authority [of the] States. In order then to give some meaning to both parts of the sentence, as a known rule of interpretation requires, we must restrain this proviso to some particular view of the parties. What was this view? My answer is that it was to save the States their right of preemption of lands from the Indians.

8 PAPERS OF JAMES MADISON, 156-57 (1973). In a similar vein the various treaties negotiated at Hopewell with the Cherokees, Choctaw, and Chicksaw, in 1785 and 1786 provided that "the United States in Congress assembled, shall have the sole and exclusive right of regulating trade" with the tribes. Treaty with the Cherokee, Art. IX, 7 Stat. 20; Treaty with the Choctaw, Art. VIII, 7 Stat. 22; Treaty with the Chickasaw, Art. VIII, 7 Stat. 25. The treaties guaranteed the tribes continued occupancy of land located in North and South Carolina and Georgia, and reflected a federal disposition to treat political and economic affairs with tribes located within the states as matters exclusively committed to national control under the Articles of Confederation.

The competing assertions of state authority over Indian affairs caused a serious deterioration of relations with the

Indian tribes during 1786 and 1787. *See* 30 JOURNALS OF THE CONTINENTAL CONGRESS 372-74 (hereinafter "J. CONT. CONG."), 32 J. CONT. CONG. 365-69, 34 J. CONT. CONG. 182-83. The potential for Indian war had seriously escalated in Georgia and North Carolina as a result of unsuccessful state efforts to manage Indian affairs on their own. In response to these problems, Secretary of War Knox reported to Congress on July 18, 1787, just months before the adoption of the Indian Commerce Clause, that a national solution to the Indian affairs problem was necessary. 32 J. CONT. CONG. 365-69. He noted, however, that state claims of authority under the Indian Affairs Clause of the Articles made such a national solution difficult:

> The power given by the Confederation, to the United States "of regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated" is perhaps, too inexplicit to be applied as a remedy in the present case. The Creeks are an independent tribe, and cannot with propriety be said to be members of the State of Georgia, yet the said State exercises legislative jurisdiction over the territory in dispute.

Id. at 366-67. Among Secretary Knox's solutions to these problems was "[s]uch an explanation by Congress, of the before mentioned part of the Confederation, as would enable the United States to regulate the necessary boundaries for the independent tribes of Indians, notwithstanding that they might be comprehended within the limits of any State." *Id.*

Echoing Secretary Knox's remarks, a committee of the Continental Congress reported in August 1787, recommending the complete and undivided federal control over the political and economic relations with the tribes. Committee Report, 33 JOURNALS OF CONGRESS 454 *et seq.* (Aug. 3, 1787). The Committee Report is absolutely indispensable to an understanding of the meaning attached to the Indian Commerce Clause by the drafters of the Constitution.

The Report noted that certain encroachments had been made on the land of the Creek and Cherokee Nations by the people of the States of Georgia and North Carolina and that no regular trade had developed between our citizens and those Nations. *Id.* at 455. The Committee noted that the problems were so serious that the Creeks might be contemplating war against the inhabitants of Georgia, and recommended a serious inquiry by Congress. *Id.* at 456. The Report stated that justice and policy required that the paramount purpose of Congress ought to be "promoting peace and free trade between them and the Indians," *id.*, and noted that the Tribes themselves complained that they suffered from lack of trade and might seek trade with Florida, then under Spanish dominion, if the trade were not promoted. The Report concluded that the complaints of the Tribes were not without just cause:

> An avaricious disposition in some of our people to acquire large tracts of land and often by unfair means, appears to be the principle source of difficulties with the Indians.

Id. at 457.

Most importantly, the Committee concluded the greatest difficulties arose because of misunderstandings concerning the meaning of Article IX of the Articles of Confederation:

> [B]ut there is another circumstance far more embarrassing, and that is the clause in the confederation relative to managing all affairs with the Indians etc. is differently construed by Congress and the two States within whose limits the said tribes and disputed lands are. The construction contended for by those States, if

> right, appears to the committee, to leave the federal powers, in this case, a mere nullity; and to make it totally uncertain on what principle Congress is to interfere between them and the said tribes; The States not only contend for this construction, but have actually pursued measures in conformity to it. North Carolina has undertaken to assign land to the Cherokees, and Georgia has proceeded to treat with the Creeks concerning peace, lands, and the objects, usually the principal ones in almost every treaty with the Indians. This construction appears to the Committee not only to be productive of confusion, disputes and embarrassment in managing affairs with the Independent tribes within the limits of the States, but by no means the true one.

Id. at 457-58.

The Committee noted that it was accepted that the tribes had just claims to the lands occupied by them and not fairly purchased from them, and that the general focus of the management of Indian affairs had been on the making of war and peace, purchasing certain tracts of lands, fixing the boundaries between them and the people of the colonies, and preventing the latter from settling on the lands left in the possession of the tribes. The Committee observed:

> *The powers necessary to these objects appear to the Committee to be indivisible,* and that the parties to the confederation must have intended to give them entire to the Union, or to have given them entire to the State; these powers before the Revolution were possessed by the King, and exercised by him nor did they interfere with the legislative right of the colony within its limits; this distinction which was then and may be now taken, may perhaps serve to explain the proviso, part of the recited clause. *The laws of the State can have no effect upon a tribe of Indians or their lands within the limits of the State so long as that tribe is independent, and not a member of the State,* yet the laws of the State may be executed upon debtors, crim-

> inals and other proper objects of those laws in all parts of it, and therefore the Union may make stipulations with any such tribe, secure it the enjoyment of all or parts of its lands without infringing upon the legislative right in question. It cannot be supposed the State has the powers mentioned without making the recited clause useless, and without absurdity in theory as well as in practice; *for the Indian tribes are justly considered the common friends or enemies of the United States, and no particular State can have an exclusive interest in the management of Affairs with any of the Tribes, except in some uncommon cases.*

Id. at 458-59. (emphasis added)

The Committee observed that there were but two solutions to the problem. One was for the States to make liberal cessions of territory to the United States,

> the other is for those States to accede to Congress's managing exclusively, all affairs with the Cherokees, Creeks, and other independent tribes within the limits of the said States, so that Congress in either case may have the acknowledged power of regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people.

Id. at 460. Subsequent events reveal that the Framers settled upon a constitutional solution.

It should be emphasized that the focus of the Committee's primary concern was not on relations between the states and the Indians in general, but rather on the problems that arose when a state attempted to govern relations with the *tribes.* The Committee emphasized that national "Indian policy" had been directed toward such items as the making of war and peace, the purchasing of the tribal lands, and the fixing of boundaries between the tribes and the state governments, and other matters constituting political relations, *id.* at 458-59; the focus of the Committee's concern, therefore, was not directed at trade with Indians generi-

cally, but rather at state interference with the *political relations* between the *tribes* and the national government.

The problems caused by state incursions into federal prerogatives were, of course, a paramount concern of the drafters of the Constitution. James Madison stated in his introduction to the debates in the Constitutional Convention, J. MADISON, 1 JOURNAL OF THE FEDERAL CONVENTION 47 (E. H. Scott Ed. 1894):

> *In other cases the Federal authority was violated by treaties and war with the Indians, as by Georgia;* by troops raised and kept without the consent of Congress, as by Massachusetts; by compacts without the consent of Congress, as between Pennsylvania and New Jersey, and between Virginia and Maryland.

(emphasis added) Similarly, in a June 19, 1787 debate, Madison responded to a defender of the Articles of Confederation as follows:

> Will it prevent encroachments on the Federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic, ancient and modern. *By the Federal Articles, transactions with Indians appertain to Congress, yet in several instances the States have entered into treaties and wars with them.* In like manner, no two or more States can form among themselves any treaties, etc. without the consent of Congress: yet Virginia and Maryland, in one instance, Pennsylvania and New Jersey, in another, have entered into compacts without previous application or subsequent apology.

Id. at 190. (emphasis added)

In the Convention, on August 18, 1787, fifteen days after the Committee Report, James Madison suggested that Congress be given the power

> [t]o regulate affairs with the Indians, as well within as without the limits of the United States.

J. MADISON, 2 JOURNAL OF THE CONSTITUTIONAL CONVENTION 549 (E.H. Scott Ed. 1894.) On September 4, 1787, one month after the Committee Report, the final language of the Indian Commerce Clause, as it now appears in the Constitution, emerged from Committee. *Id.* at 654. It provides simply:

> Congress shall have power . . . To regulate Commerce . . . with the Indian Tribes . . . .

For present purposes, there are four significant changes from the language of the Articles to that of the corresponding section of the Constitution. First, the reference to "Indians" in the Articles was changed to "Indian Tribes" in the Constitution; second, the phrase "Indians *not members of any of the states*" was deleted; third, the Articles' proviso that "the legislative right of any state within its own limits be not infringed or violated" was deleted in the Constitution; fourth, the Indian Commerce Clause was juxtaposed with the Interstate and Foreign Commerce Clauses.[43]

That the problems arising from the disputed interpretation of the Articles of Confederation led directly to the Constitution's Indian Commerce Clause is indisputable. James Madison, in defending the language of the Indian Commerce Clause in THE FEDERALIST stated:

> The regulations of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the states,

43. In the Articles, on the other hand, Congress was given no control of Interstate Commerce and, although certain aspects of foreign relations were reserved to the Congress, there was no equivalent to the Foreign Commerce Clause. This juxtaposition suggests that Indian commerce shares with foreign and interstate commerce certain core protections from state discrimination. *See* Section IV, *infra*.

> and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of Confederation have inconsiderately endeavored to accomplish impossibilities, to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.

J. MADISON, THE FEDERALIST No. 42 (January 22, 1788) at 290 (Central Law Journal Ed. 1917).

Nationalization of relations with the tribes could not have been regarded as a radical change. As noted above, the Crown had previously attempted to exercise all powers governing the relation with the tribes to the exclusion of the colonial governments, and the English thought that problems with relations with the tribes had developed because of "local interfering of particular Provinces."[44] Further, the majority on the Committee believed that the proper interpretation of the Articles of Confederation would hold that governance of political relations with the tribes belonged exclusively to the national government and not the states, notwithstanding the ambiguous qualifying phrase.

Construed against the backdrop of the Articles of Confederation and the Committee's pointed rejection of Georgia's attempt to regulate relations with the Indian tribes, the Indian Commerce Clause at a minimum amounts to

44. 7 N.Y. COL. DOC. 634-36, 637-41, note 41, *supra*.

a federalization of the relations with the *tribes* to the exclusion of the states. Whatever negative constitutional implications may exist from the Clause as to the power of the states over *individual* Indians, *cf. Moe,* 425 U.S. 481 n. 17, the incorporation of the word "Tribes" into the Clause, coupled with the repeated reference to the "independent tribes" in the Committee Report (with its concomitant recognition of the tribes as political entities capable of making policy with the United States), indicates that the Clause negates any power in the state to determine, independent of federal authority, the relations with the tribes themselves. As the Report noted:

> [W]hatever may be the true construction of the recited clause [of the Articles of Confederation], the Committee are persuaded that it must be impracticable to manage Affairs with the Indians within the limits of the two States, so long as they adhere to the opinions and measures they seem to have adopted.

Committee Report at 459-60. Other than a cession of territory to the United States, which would itself remove the jurisdiction of the States, the only solution was

> for those States to accede to Congress's managing, *exclusively* all affairs with the Cherokees, Creeks, and other independent Tribes within the limits of said states . . .

Id. at 460. (emphasis added)

The constitutional provision granting Congress power to regulate "Commerce with the Indian Tribes," therefore, gives implicit recognition to the sovereign, though dependent, status of the tribes, and declares that the federal government, not the states, shall govern their relations. *See also Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832).[45]

45. Not only is Justice Marshall's holding in *Worcester* tied to the nega-
[Footnote continued on page 82]

The governmental status of Indian tribes also receives constitutional recognition in the Supremacy Clause, Article VI of the Constitution, which provides in part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .* (emphasis added)

As Justice Marshall suggests in *Worcester*, the express recognition in the Constitution of the supremacy of treaties previously made stands as an implicit recognition of the sovereign status of the tribes because the United States had entered into treaties with the tribes after the commencement of the Revolutionary War but before the Constitution was ratified. Referring to the treaty executed between the United States and the Cherokee Nation at Hopewell on November 28, 1778, he stated:

> The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The word "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense.

31 U.S. (6 Pet.) at 559.

The analysis presented in this section strongly supports the conclusion that the Indian Commerce Clause is distinct in meaning and scope from the Interstate Commerce Clause. This is by no means an anomalous suggestion, for in *Japan Line, Ltd. v. County of Los Angeles*, ... U.S. ...., 60 L. Ed. 336, 346 (1979), this Court recently held that a "more extensive constitutional inquiry" is required where a state seeks to tax foreign, as opposed to interstate commerce. The Indian Commerce Clause has similar attributes.

Felix Cohen notes that the Indian Commerce Clause power is "much broader than the power over commerce between states" because it comprehends aspects of intercourse which have had little or no relation to commerce. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 91, 92 (G.P.O. 1941).[46]

Moreover, the Indian Commerce Clause has a completely different focus than the Interstate Commerce Clause. As this Court recently stated in *Hughes v. State of Oklahoma*, ... U.S. ...., 60 L. Ed. 2d 250, 255 (1979), the Interstate Commerce Clause was designed to "avoid the tendencies toward economic Balkanization that plagued relations among the Colonies and later among the States under the Articles of Confederation." It is directed at economic, not political relations between the states.

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tive implications of the Commerce Clause, *see* Section III B *infra*, but the opinion sets out some of the history outlined above and refers specifically to the Committee Report and the problems concerning the Articles. 31 U.S. (6 Pet.) at 558-59.

46. *See also* Able, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941), relied upon by this Court in *Japan Line, supra*, where the author concluded that regulation of commerce in connection with transactions with Indians was "so distinct and specialized a subject as to afford no basis for argument as to the meaning of the rest of the clause." *Id.* at 468. He noted that "Indian trade was a special subject with a definite content, which had been within the jurisdiction of Congress under the Articles of Confederation" and "thus derived from a totally different branch of the Randolph outline than did the control over foreign and interstate commerce." *Id.* at 467. The author also noted that the provision regarding commerce with the tribes emerged in a different time in the Constitutional Convention than did the provisions regarding commerce with foreign nations and among the several states and was not added to the formal clause until September 4, 1787.

Regulation of Indian commerce, on the other hand, has historically involved regulation of the *political* relationships with entities whose attributes of sovereignty in many ways resemble those of foreign nations. The Framers clearly recognized that these political relationships were appropriately the exclusive province of the federal government, as were foreign relations. Non-uniform state regulations and taxation in the area of Indian commerce will tend to disrupt federal purposes and policies no less than in the area of foreign commerce. *Cf. Japan Line Ltd.*, ... U.S. ...., 60 L. Ed. 2d at 350 (1979).

Imposition of the state tax here is unconstitutional not only because it interferes with the ability of the Tribes to carry out governmental functions, but also because it would actually be destructive of the commerce now regulated by the Tribes. The impact of the imposition of the state taxes would be visited directly upon the intercourse of the Tribes which is, by the Indian Commerce Clause, constitutionally vested exclusively in the United States.

Interference with the trade, governments, and economies of the Tribes however, is only half of the constitutional equation. Imposition of the state tax would also interfere directly with the prerogatives of the United States. The purpose of the Indian Commerce Clause was to vest exclusively in the United States the ability to control the political and economic relations with the tribes. Under our Constitution, it is for the United States, not the State, to determine what restraints shall be imposed upon trade with the tribes, and how that trade shall be utilized to promote the policies of the United States. The state excise tax, because of its profound impact upon the economy and political structure of the Tribes and their ability to function,

interferes fundamentally with the options of the federal government in executing Indian policy.

Further, Congress and the Executive Branch have not remained idle. Instead, they have moved a great distance down the constitutionally prepared avenue in governing the relations of the tribes. As discussed in detail in Section III C, *infra*, Congress, through the Indian Reorganization Act, the Indian Self-Determination and Education Assistance Act, and other statutes, has specifically determined that it will pursue a policy of promoting tribal self-government and self-determination in execution of its constitutional responsibility. Pursuant to its powers under the Constitution, and in implementation of the Indian Reorganization Act and other federal statutes promoting the exercise of tribal government, the United States has specifically approved the Constitutions and taxing ordinances of the Appellee Tribes. When considered against the constitutional backdrop of federal authority over relations with the Tribes, it is manifest that imposition of the state tax would result in a fundamental interference with congressional enactments, executive functions and federal policies. *See* Section III C, *infra*.

B. The decisions of this Court recognize the negative implications of the Indian Commerce Clause especially in situations involving essential tribal relations. *Moe v. Confederated Salish and Kootenai Tribes* does not preclude consideration of this constitutional preemption of state statutes which interfere with tribal sovereignty or discriminate against Indian commerce.

The decisions of this Court have long recognized the preemptive effect of the Indian Commerce Clause over state attempts to regulate the essential economic and political relations of the tribes. The Tribes' analysis is supported

by these cases. In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), the Court explicitly declared unconstitutional laws of the State of Georgia which infringed on the tribal sovereignty of the Cherokee Nation. Chief Justice Marshall stated:

> [T]he said laws of Georgia are unconstitutional and void, because they interfere with, and attempt to regulate and control the intercourse with the said Cherokee nation, which, by the said Constitution, belongs exclusively to the Congress of the United States. . . .

Id. at 540. While the broadest reaches of Chief Justice Marshall's opinion in *Worcester,* suggesting an automatic and absolute exclusion of state law in Indian country,[47] have been qualified by later cases, the strict holding of the case was clearly predicated on the negative implications of the Indian Commerce Clause. This holding, as discussed below, was reaffirmed by the Court in *Williams* and *McClanahan.*

Similarly, in *The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867), this Court effectively held that state efforts to impose a land tax on reservation Indians were preempted:

> If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be *governed exclusively* by the government of the Union. If under the control of Congress, from necessity there can be no divided authority.

Id. at 755. (emphasis added)

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47. Justice Marshall stated:

> The Cherokee nation . . . is a distinct community occupying its own territory . . . in which the laws of Georgia can have *no* force. . . . .

31 U.S. (6 Pet.) at 561. (emphasis added)

In *Williams v. Lee,* 358 U.S. 217 (1959), the Court preserved the preemptive effect of the Commerce Clause as interpreted in *Worcester,* at least in cases where tribal self-government was involved:

> Over the years this Court has modified these principles in cases *where essential tribal relations were not involved* and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained.

358 U.S. at 219. (emphasis added) After referring to various cases in which state law had been allowed to apply in the absence of any tribal involvement, the Court stated:

> Essentially, *absent governing Acts of Congress,* the question has always been whether the state action infringed on the right of reservation Indians to make their laws and be ruled by them.

358 U.S. at 220. (emphasis added) Not only did the Court specifically uphold the *Worcester* preemption test, but the emphasized phrase, "absent governing Acts of Congress," strongly suggests a constitutionally-based preemption.

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973), is to the same effect. After noting that the broader reaches of *Worcester,* which it termed the "Indian sovereignty doctrine," had imposed a jurisdictional limit of the reach of state law on Indian reservations, the Court quoted the *Williams* language that this principle had been modified only in cases "where essential tribal relations were *not* involved . . ." 411 U.S. at 171. (emphasis added)

The State argues, however, that any inquiry into the "negative implications" of the Indian Commerce Clause is barred by *Moe*:

> It is *now* clear, after *Moe* that the Clause is solely a source of Congressional authority which creates no

> automatic bar to State tax law, at least so far as on-reservation application of that law is concerned.

State Br. at 39.[48] The State's reference is to footnote 17 of this Court's Opinion in *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 481 n. 17 (1976).[49] To read the Court's language, however, as holding that the Commerce Clause imposes no restrictions whatsoever on state taxation of Indian commerce is unwarranted. In the text of its opinion immediately preceding the footnote, this Court stated:

> [T]he cigarette sales tax, as applied to *on-reservation sales by Indians to Indians*, conflict[s] with the congressional statutes which provide the basis for decision with respect to such impositions.

425 U.S. at 480-81. (emphasis added) (Citing *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)).

In its footnote, the Court stated:

> It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U.S. Const., Art. VI, cl 2, and not any *automatic exemptions* as a matter of constitutional law either under the Commerce Clause or the intergovernmental-immunity doctrine. . . .

425 U.S. at 481 n. 17. (emphasis added)

The issue before the Court in *Moe* was the validity of the state sales tax, "as applied to on-reservation sales by

48. It does concede, however, sufficient substantiality to the issue to give the three judge court jurisdiction pursuant to 28 U.S.C. §2281. *Id.*

49. The District Court relied on the same footnote in *Moe* for its conclusion that

> [a] full review of [the Tribes' arguments] is, however, unnecessary. The simple answer is that such claims have been prohibited by the Supreme Court.

446 F. Supp. at 1356, J.S. App. at 25.

Indians to Indians." 425 U.S. at 480. Both *McClanahan* and *Mescalero Apache*, relied upon by the Court for its statement that there was no "automatic exemption" under the Indian Commerce Clause, also dealt with imposition of state taxation on reservation Indians. Neither *Moe*, *McClanahan* nor *Mescalero* involved any interference with tribal self-government nor any discrimination against Indian commerce.[50]

The key to the correct interpretation of the Court's language is its declaration that there are no *"automatic exemptions." McClanahan, Mescalero Apache* and *Moe* hold that the validity of a state tax against Indians which neither interferes with tribal self-government nor discriminates against Indian commerce will be judged by whether it conflicts with the statutes and treaties affecting the tribe and not by any "automatic" constitutional exemption. The Court did *not* hold, on the other hand, that the Indian Commerce Clause places no restrictions on state action affecting Indian commerce which discriminates or interferes with tribal sovereignty.

Thus, in *McClanahan*, this Court held that the broadest reaches of the "Indian sovereignty doctrine," as articulated by Justice Marshall in *Worcester*, were no longer generally relied upon by the Court as dispositive principles. Marshall had held that state law could have no play whatsoever within the geographic limits of an Indian reservation. 411 U.S. at 168. Indian sovereignty operated, in short, as an

50. *Moe* cannot be gratuitously extended therefore to situations where such problems are presented. Nor did *Moe* qualify the language of *Williams* that *"absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their laws and be ruled by them." 358 U.S. at 220. The *Williams* test, as noted earlier, suggests a preemptive effect to the Clause.

"automatic exemption." Rather than apply such a blanket exemption, the Court stated in *McClanahan* that it would

> look . . . to the applicable treaties and statutes which define the limits of State power.

411 U.S. at 172.

But, as noted above, *McClanahan* confirmed that the *Worcester* preemption principle has been modified only "in cases where essential tribal relations were *not* involved and where the rights of Indians would not be jeopardized. . . ." *Id.* at 171-73 citing *Williams v. Lee*, 358 U.S. 217, 219-220 (1959). *McClanahan*, and derivatively *Moe* since it relied on the *McClanahan* analysis, did not qualify the utility of the preemption analysis presented here, for cases in which "essential tribal relations" *are* involved.[51]

C. The relevant federal statutes, particularly when read against the constitutional federalization of essential tribal relations implicit in the Indian Commerce Clause, preempt imposition of the state excise tax on tribally taxed and operated enterprises.

1. *The relevant federal statutes were designed to promote tribal self-government and economic self-sufficiency.*

The recent cases of this Court consistently recognize that a principle focus of contemporary federal policy is upon

51. *McClanahan* does suggest that statutory and treaty preemption are preferred grounds of decision and the Court will reach the constitutional issues only if it finds no preemptive conflicts between state legislation and federal statutes or treaties. 411 U.S. at 172 n. 8:

> The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question . . . The question is generally of little more than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.

See generally, Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 STAN. L. REV. 208 (1959).

strengthening tribal self-government.[52] In *Fisher v. District Court*, 424 U.S. 381 (1976), the Court described §16 of the Indian Reorganization Act, 25 U.S.C. §476 as

> a statute specifically intended to encourage Indian tribes to revitalize their self-government.

In *Bryan v. Itasca County*, 426 U.S. 373, 389, n. 14 (1976), this Court noted that

> Present federal policy appears to be returning to a focus upon strenthening tribal self-government, *see, e.g.*, Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. §§1451, *et. seq.* and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. §§450, *et seq.*[53]

52. This policy is not new in origin. As Justice Marshall observed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 556-57:

> From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries within which their authority is exclusive, and having a right to all lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

The Trade and Intercourse Act of 1790, 1 Stat. 137, "[a]n Act to regulate trade and intercourse with Indian tribes," provided, for example, that no sale of lands made by any Indians would be valid unless made by public treaty with the tribe, *id.* at §4, clearly recognizing the nationhood and political authority of the tribes over their land.

In a similar vein, the report of a committee of the House of Representatives, in explanation of a provision of an 1834 statute which provided for annuity payments to the chiefs of the respective tribes, stated:

> The payments are required by the terms of the treaties, to be paid to the tribe as a political body capable of acting as a nation . . . . The payment to the Chiefs is a mode simple and certain . . . [to enable the tribe] to apply them to the expenses of their government, to the purpose of education, or to some object of general concern.

H. Rept. 474, 23rd Cong., 1st Sess. May 20, 1834 at 2-3, cited in F. COHEN, FEDERAL INDIAN LAW at 107-08 (1966 ed.).

53. In *Bryan*, this Court observed that even in periods of our history when Congress has moved toward a policy of assimilating Indians into the dominant culture, Congress has been judicious in its continued protection of tribal self-government. Holding that Public Law 83-280 did not confer

[Footnote continued on page 92]

In *Santa Clara Pueblo v. Martinez*, 436 U.S. at 62, the Court noted that one of the purposes of the Indian Civil Rights Act of 1968 was to "promote the well-established 'federal policy of furthering Indian self-determination.'" *See also Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Fisher v. District Court*, 424 U.S. at 391.

And, as noted in Section II, *supra*, the Court in *Williams v. Lee*, 358 U.S. at 221 (1959), recognized that the provisions of the various treaties setting aside reservations for the permanent home of the Indians implicitly confirmed the governmental authority of the tribes over their reservations.

The statutes most critical for this preemption analysis have been discussed above in Section I B in support of the conclusion that Congress has ratified tribal power to tax non-Indians involved in transactions with Indians on the reservations.

Of central importance is the Indian Reorganization Act of 1934. The Act was designed in part "to grant certain rights of home rule to Indians," 48 Stat. at 984. *See generally, Comment, Tribal Self-Government and the Indian Reorganization Act* of 1934, 70 MICH. L. REV. 955 (1972). Section 16 of the Act, 25 U.S.C. §476, implemented that design by confirming in the tribes "all powers vested by existing law." As has been noted, before it passed the Act, Congress had been specifically advised by Commissioner Collier of *Buster v. Wright's* holding that tribes had power to tax non-Indians. The contemporaneous opinion of the Solicitor for the Department of the Interior, issued at the request of Congress, noted that among those powers vested by existing law is the power of levying taxes against non-Indians. Solicitor's Opinion, 55 I.D. at 46. And, as was pointed out, the Secretary of the Interior has approved the assertions of taxing jurisdiction over non-Indians in the Constitutions and ordinances of each of the three Appellee Tribes.[54]

The Indian Civil Rights Act of 1968, 25 U.S.C. §1301 *et. seq.* has a similar focus. *See Santa Clara Pueblo v. Martinez,*

taxing jurisdiction on the states, the Court noted that the omission of any specific reference to taxing jurisdiction was highly significant because "mention would normally be expected if such a sweeping change in the status of tribal government . . . had been contemplated by Congress." 426 U.S. at 381. The Court also noted that there was nothing in the legislative history to suggest that

> Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private voluntary organizations,' *United States v. Mazurie*, 419 U.S. 544, 577 (1975)—a possible result if tribal governments and reservation Indians were subjected to the full panoply of civil regulatory powers, including taxation, of state and local governments.

426 U.S. at 388. The Court noted that there was no grant of state jurisdiction over the tribes themselves in the statute, and that the statute contemplated the continuing vitality of tribal government. 426 U.S. at 389.

54. While the Makah Indian Tribe is organized pursuant to §16 of the Indian Reorganization Act, the Colville Confederated Tribes and the Lummi Indian Tribe voted not to come under the provisions of the Act. This should make no difference for purposes of this preemption analysis, however, since Congress has not distinguished between IRA and non-IRA tribes in implementing federal Indian policy in the years since the IRA's enactment. The definitional section, for example, of the Indian Civil Rights Act of 1968, 25 U.S.C. §1301, regarding "Indian tribes" is typical. Under the statute "Indian tribe" is defined as any tribe, band or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government." Even more specifically, Congress enacted an amendment in 1935 to the Indian Reorganization Act, 49 Stat. 378, 25 U.S.C. §478b, designed to foreclose separate legal treatment for IRA and non-IRA tribes:

> All laws, general and special, and all treaty provisions affecting any Indian reservations which has voted or may vote to exclude itself from the application of [the Indian Reorganization Act] shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said sections.

The statute provides that all applicable treaties and statutes also apply to tribes electing to come under the Act.

436 U.S. 49, 62 (1978), and the discussion in Section I B, *supra*, at 27.

The Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. §450, contains a congressional declaration of policy to "respond to the strong expression of the Indian people for self-determination" and to establish a "meaningful Indian self-determination policy," 25 U.S.C. §450a, and sets forth an express finding that "the Indian people will never surrender their desire to control their relationships, both among themselves and with non-Indian governments, organizations and persons." 25 U.S.C. §450(a). The Act provides that Congress is to implement this policy largely by contracting with the tribes for performance of certain governmental functions previously performed by the Bureau of Indian Affairs to the tribes. *See* 25 U.S.C. §§450f-m.[55] In addition, numerous federal statutes recognize the general governmental authority of the tribes over such matters as air pollution, mining on the reservations, urban and rural planning, housing, solid waste disposal and pollution prevention; and some statutes specifically contemplate exercise of tribal governmental authority over non-Indians. *See* Section I B, *supra*.

One final statute deserves emphasis—the Federal Cigarette Racketeering Act, enacted on November 2, 1978, P.L. 95-575, 92 Stat. 2463. The Act makes it a federal crime to knowingly ship, transport, receive, possess, sell, or purchase any quantity of cigarettes in excess of 60,000 "which bear no evidence of payment of applicable state cigarette taxes in the state where such cigarettes are found." The

55. *See also* 25 U.S.C. §2010, 92 Stat. 2321, enacted in 1978 which, in effect, establishes a self-determination policy for Indian education:

> It shall be the policy of the Bureau, in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education.

legislative history contains an express disclaimer of any intention to affect the existing exemption of reservation cigarette enterprises from the collection of state cigarette excise taxes. The Conference Report on the Act states:

> Some concern was expressed in the course of the conference that the definition of "contraband cigarettes" inadvertently extinguished rights of certain Indians and Indian tribes under current law to engage in commercial sale of cigarettes in Indian country free of State taxation. The phrase "applicable State cigarette taxes" makes it clear that this legislation is not intended to affect transportation or sale by Indians or Indian tribes acting in accordance with legally established rights.
>
> The conferees do not intend that this bill address the current exemption from state taxation of cigarette sales on Indian reservations and nothing in this bill is intended to affect this or any other immunity from state tax held by any Indian or Indian tribe. Similarly, other commercial cigarette sales exempted by law from state taxation (for example, military post exchanges) are not affected by this legislation.

H. Conf. Rept. No. 74-1778 at 9 n. 1. 12B U.S. Code Cong. and Admin. News 7026, 7046, 95th Cong. 2d Sess. In the face of the dispute concerning the application of state taxes in circumstances such as these, Congress took special care to avoid interfering with tribal self-government and economic development.

In addition, the promotion of tribal economic self-sufficiency and development is a powerful theme in contemporary congressional policy and is reflected in a whole series of congressional enactments dealing with Indian tribes.[56] For example, in the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. §1451, et. seq., Congress declared to be its poli-

56. *See generally*, Task Force 7, Report on Reservation and Resource Development and Protection, Final Report to the American Indian Policy Review Commission, 87 et. seq. (1976).

cy to "help develop and utilize Indian resources, both physical and human, to a point where Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 25 U.S.C. §1451. Similarly, the Comprehensive Employment Training Act of 1973 set up special Indian manpower programs designed to alleviate employment problems on Indian reservations where they were particularly acute.[57]

The Public Works and Economic Development Act of 1965, 79 Stat. 552, 42 U.S.C. 3121, et seq., reflects concern expressed by Congress that Indian areas receive special assistance. Indian tribes are eligible for Title I grants for public works and development facilities and special provision is made for supplemental grants to Indian tribes in excess of that available to non-Indian communities. 42 U.S.C. §3131(c). In addition, special provision is made under Titles II and III of the Act for other financial and technical assistance specially addressed to Indian tribes. 42 U.S.C. §§3142(b)(9)(B), 3151(b), 3161(a)(3); *see* Task Force 7 at 152.[58]

57. 92 Stat. 1962, 29 U.S.C. §872. At least 4.5% of funds authorized under the Act are to be allocated for expenditures to aid economic development of Indian communities. 29 U.S.C. §872(g).

58. The Economic Development Administration has established an Indian desk as an administrative department within the agency. The agency has formulated a special Indian development program whose general objective is "to assist Indians in taking effective steps, compatible with the Indian cultural heritage, to achieve stable local economics and economic growth, new long-term employment opportunities and improved local conditions." Task Force 7 at 154-55.

For further discussion of programs implementing the congressional policy of encouraging economic self-sufficiency, *see generally*, Toward Economic Development For Native American Communities, Joint Committee Print, Joint Economic Committee (91st Cong. 1st Sess.) Vol. 2, Part II (1969).

Similarly, a 1962 amendment to the Public Works or Facilities Act of 1955, P.L. 87-808, made specific findings that Indian tribes were "unable to raise the necessary funds at reasonable rates" for essential public works and facilities, 42 U.S.C. §1491, and made them eligible for a grant and loan program.

Congressional policy promoting economic self-sufficiency goes back several decades although the policy has obviously not been completely successful. Section 10 of the Indian Reorganization Act set up a revolving loan fund "for the purpose of promoting the economic development of such tribes and of their members." 25 U.S.C. §470. The legislative history of the Indian Reorganization Act also evidences a general federal purpose to promote Indian economic development and self-sufficiency.[59]

Further, the policy is implicit in the treaties, statutes and executive orders setting up the reservations themselves. One of the fundamental purposes of the United States in setting aside the reservations was to create for the tribes a homeland in which they could become economically self-sufficient. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Court stated that the creation of the reservation for the Metlakatla Indians was designed to "encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life." *Id.* at 89. *Cf. Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 600 et. seq. (1963).

59. *See e.g.*, Hearings Before the House Comm. on Indian Affairs on H.R. 7902 (73rd Cong 2d Sess.) 24-25 (Commissioner Collier's explanatory memorandum); Hearing Before the Committee on Indian Affairs, United States Senate on S. 2755 and S. 3645 (73rd Cong. 2d Sess.) 112-13 (testimony of Mr. Fredenberg concerning Menominee timber operations), 140, 152 (testimony of Ward Shephard).

Congress has grappled with the problem of economic dependency of Indian tribes for a century or more. The strengthening of tribal government has been the means chosen by Congress for attainment of the goal of self-sufficiency. Quite clearly, imposition of the state excise tax is in conflict with these federal policies. That conflict is resolved by application of the principle of federal preemption.

2. *The scope of the federal preemption of state statutes depends on the nature and extent of the respective interests of the state and national governments in the subject matter.*

Congressional statutes which do not expressly preempt state legislation in the field nevertheless override state laws with which they conflict by virtue of the provisions of the Supremacy Clause, United States Constitution, Art. VI. The test was recently stated by this Court as follows:

> The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether, under the circumstances of this particular case [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977), citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As the Court elaborated,

> [t]his inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.

430 U.S. at 526.

The preemption decisions of the Court cover a broad variety of subjects and a whole range of conflicts ranging from direct violations of federal law to conflicts by implication. It is not surprising, therefore, that this Court has adopted a flexible approach to preemption problems designed to take account of various levels of conflict, and various degrees of state and federal interest. In *Hines v. Davidowitz*, Justice Black observed:

> This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.

312 U.S. at 67.

State statutes have been held preempted both because they are in "actual conflict" with federal law and also because of "federal occupation of the field" absent any specific conflict. The range of possible situations in each category, however, is very large and includes both direct conflicts and those arising by implication. *See Clover Leaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942).[60]

A careful examination of the Court's holdings, however, reveals that the scope of the preemption declared by the Court varies according to a number of separate factors.

60. Thus, for example, this Court has found an actual conflict in situations ranging from that in *Free v. Bland*, 369 U.S. 663 (1962), in which a Texas community property law was held directly contradictory to applicable federal treasury regulations governing the passage of a United States Savings Bond on the death of a co-owner, to more ambiguous situations in which state statutes were struck down because they were in conflict with the underlying objectives of federal statutes. *See e.g., Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967) (striking down a state unemployment compensation law held to be inconsistent with the provisions of the National Labor Relations Act encouraging persons to file unfair labor practice charges with the NLRB).

One important factor is the nature of the national interest in the subject matter. If the field is one which is traditionally deemed "national", the Court is much more vigilant in striking down state incursions into a subject that Congress has historically reserved to itself. As the Court stated in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), one important factor was whether "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *See e.g., Hines v. Davidowitz*, 312 U.S. 52 (1941), striking down a state statute requiring registration of aliens, in which the Court was solicitous of the paramount federal interest in matters germane to foreign affairs, and *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972), in which a state nuclear waste law was held preempted. *See also Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

On the other hand, if the activity or interest affected by the state statute is more "local" in character, the Court is much less inclined to find preemption. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), holding that a municipality could enforce its smoke abatement ordinance against a federally-licensed steamship moving in interstate commerce.

The Court will also look carefully to the state statute to see what state interest is being served. The Court is much more reluctant to find preemption in areas which our constitutional system has traditionally allocated to the states. As the Court observed in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947):

> [I]n a field which the States have traditionally occupied . . . we start with the assumption that historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

In addition, the Court has shown considerable reluctance to preempt a state's laws designed to protect the health and safety of its citizens.[61]

Finally, the cases evidence careful consideration of the effect of the presence of federal regulatory agencies in the area at issue. The Court has been careful to determine whether federal policy may be frustrated by state action that trespasses on agency prerogatives. *See, e.g., San Diego Building Trade Council v. Garmon*, 359 U.S. 236 (1959), in which the Court emphasized the fact that "Congress has entrusted administration of [national] labor policy . . . to a centralized administrative agency" and concluded that "to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purpose." 359 U.S. at 242, 244.

Consideration of these factors in the instant case strongly indicates that state laws should be given little latitude. First, as to the breadth of the federal interest, Congress has historically exercised plenary power over Indian affairs pursuant to the Indian Commerce Clause. Like its regulation of foreign commerce, federal action in Indian affairs has involved delicate relations with quasi-sovereign entities rather than the regulation of mere economic relation-

61. In *Maurer v. Hamilton*, 309 U.S. 598 (1940), a state law was upheld which forbade "cab-over-cab" trailers as unsafe even though to do so conflicted with a national statute which made it the express policy of Congress to regulate transportation by motor carriers to foster sound economic relations. *See also Comment, A Framework for Preemption Analysis*, 88 YALE LAW JOURNAL, 363 (1968); L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 376-91.

ships. Further, the states have been traditionally excluded from these relations:

> [T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history.

Rice v. Olson, 324 U.S. 786, 789 (1945). In this area, states have exercised jurisdiction only with the consent of Congress. *See McClanahan v. Arizona Tax Commission*, 411 U.S. at 170-171.

Further, the State is not attempting here to protect some significant interest of its citizenry such as health or safety. Instead, the only interest the State advances is its general interest in raising tax revenues, an interest which is, of course, also asserted by the Tribes. Moreover, the State's interest will be offset to the extent that the Tribes reduce the obligations of the State by providing their own programs.[62] Finally, Indian relations, like labor relations, are governed largely by a federal administrative agency, the Department of the Interior, which has specifically approved both the constitutional assertions of the Tribes' power to tax non-Indians and the tribal ordinances themselves. Imposition of the state tax on these transactions will, therefore, clearly conflict with the decisions of the Executive Branch of the United States.

Given these factors, it is not surprising that the preemptive scope of federal law in Indian affairs is quite broad. Its impact is enhanced by independent factors as well. As this Court noted in *McClanahan v. Arizona Tax*

62. In addition to these direct benefits, the tribal programs also diminish state obligations by reducing unemployment on the Reservations. Because of economic multiplier effects, any generation of economic activity on the Reservation will tend to generate other activity, which in turn will further reduce state obligations.

Commission, Indian preemption questions must be considered against the "backdrop" of tribal sovereignty and "the relevant treaty and statutes. . . read with this tradition of sovereignty in mind." 411 U.S. at 172 and 173. Further, in interpreting federal statutes, the courts are required to be guided by the "eminently sound and vital canon," *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n. 7 (1976), that ambiguities in legislation affecting retained tribal sovereignties are to be construed in favor of the tribes. *See Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, ... U.S. ....., 58 L. Ed. 2d 740, 758 (1979). Finally, the federal statutes must be construed in light of the purpose and meaning of the Indian Commerce Clause to federalize the relations with the Indian tribal governments to the exclusion of the states.

Three recent decisions of this Court specifically advance the application of federal preemption doctrine in Indian affairs.[63] The most concise description of its working is found in *Bryan v. Itasca County*, 426 U.S. 373, 376 n. 2:

> The *McClanahan* principle derives from a general preemption analysis. . . that gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes. . . and 'to regulate and protect the Indians and their property against interference even by a state,' . . . This pre-emption analysis draws support from "the 'backdrop' of the Indian sovereignty doctrine," *Moe v. Salish & Kootenai Tribes*, 425 U.S.

63. *See also Chief Seattle Prop. v. Kitsap County*, 86 Wn.2d 7, 541 P.2d 699 (1977), where the Washington Supreme Court recognized that federal preemption in Indian law may apply to invalidate a state tax even on a non-Indian:

> Furthermore, if the state tax imposed on an Indian or a non-Indian would substantially interfere with a discernable federal policy to aid the Indian, the tax would be invalid.

86 Wn.2d at 14, 541 P.2d at 705.

> 463, 475 (1976); '[t]he policy of leaving Indians free from State jurisdiction and control [which] is deeply rooted in the nation's history,' . . . and the extensive federal legislative and administrative regulation of Indian tribes and reservations. . . . 'Congress has. . . acted consisten ly upon the assumption that the states have no power to regulate the affairs of Indians on a reservation,' and therefore 'state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), the Court held that the federal treaties and statutes governing Indian affairs were to be given a pre-emptive effect notwithstanding the absence of any *specific* federal bar against the application of state jurisdiction. The Court, noting that the Navajo Treaty did not explicitly provide that the Indians were to be free from state law, stated that when read in light of the applicable canons of construction and the history of the tribal relations with the United States, the Treaty committed the reservation to the exclusive sovereignty of the Navajos subject to general federal supervision. Extension of state law—including state tax law—to Indians on the Navajo Reservation was therefore precluded. 411 U.S. at 174-76. Further, the Court ruled that congressional silence on the question of state tax jurisdiction evidenced an intent to preclude the applicability of the state tax law:

> Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only *if Congress assumed that the States lacked the power to impose the taxes without special authorization.*

411 U.S. at 177. (emphasis added) Notwithstanding the lack of any showing of interference with tribal self-government, the Court held the state tax preempted.

Most important of the Court's recent decisions, however, is *Fisher v. District Court*, 424 U.S. 382 (1976). In a *per curiam* opinion, the Court noted that the Northern Cheyenne Tribe, as authorized by its Constitution adopted pursuant to §16 of the Indian Reorganization Act, had established a tribal court and granted it jurisdiction over adoptions among members of the tribe. 424 U.S. at 387. Although application of state law interfered with tribal self-government within the meaning of *Williams v. Lee*, 424 U.S. at 386, the Court entered an independent holding:

> The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by §16 of the Indian Reorganization Act, 25 U.S.C. §476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe, a question we do not decide, *that jurisdiction has now been preempted.*

424 U.S. at 390. (emphasis added)

The Court quite clearly held that in enacting its ordinance, the Tribe was implementing an overriding federal policy favoring tribal self-government which was sufficient to *preempt* state jurisdiction. Exactly the same considerations apply in the instant case.[64]

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64. Although all the parties to the *Fisher* controversy were Indians, this does not affect its applicability to the instant case. As the Court noted:

> The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff, but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.

424 U.S. at 390. In the instant case, the Appellee Tribes, like the Northern Cheyenne Tribe, were acting to implement the overriding federal policy protecting and enhancing tribal self-government. The implementation of this policy, the Court noted in *Fisher*, preempts state law.

3. *Imposition of the state tax will substantially interfere with congressional policies promoting Indian self-determination, strengthening tribal government, and encouraging economic self-sufficiency as implemented through the taxing ordinances of the Appellee Tribes.*

With these principles in mind, the state cigarette tax must be held preempted. The harsh practical reality is, if the state tax is applied to these tribally-taxed sales to non-Indians, the tribal enterprises and the resulting tax revenues will be eliminated. Either the state tax is preempted as inconsistent with federal law and policy as applied through the tribal ordinances, or the tribal system will be effectively preempted by the economics of the situation; the two competing systems cannot peacefully coexist.

The state law clearly interferes with the well-established federal policies designed to promote and strengthen tribal government. This result occurs not only because the state law will impose serious financial burdens on already "financially disadvantaged" tribes, *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. at 64, but also because imposition of the state law will directly interfere with the comprehensive tribal regulatory program. Thus, imposition of the state tax will interfere not merely with the ability of the Tribes to continue the various governmental programs that are supported by the tax revenues, but also with the "authority of Indian governments over their reservations." *Williams v. Lee*, 358 U.S. at 223.

This interference directly contravenes federal law and policy. All of the factors which demonstrate that imposition of the state tax amounts to an interference with tribal government within the meaning of *Williams v. Lee*, Section II, *supra*, require a conclusion that the state tax

has been preempted by the federal policies designed to strengthen tribal government. Imposition of the state tax will intrude upon the Tribes' performance of essential governmental functions and will cause a forced relinquishment of important governmental activities. If state law is authorized by this Court to effectively eliminate tribal taxing programs by superimposition of state taxes, the Tribes' separate and independent existence, reservation of which has been the long-standing central tenet of federal Indian policy, will be seriously compromised.

Imposition of the state tax will also seriously interfere with the existing balance of the respective jurisdictions of the states, the tribes and the federal government on the reservation. Because of the poverty of the Reservations and the lack of any substantial tax base, imposition of the state tax will have a particularly exaggerated effect. It must be emphasized that the statutes enacted by Congress are predicated on an assumption of lack of state jurisdiction over Indian reservations absent congressional authorization. When Congress has wanted state law to apply on Indian reservations, it has specifically authorized such application by statute. Its decision regarding the respective balance of state, federal and tribal law in such statutes as Public Law 83-280, the Self-Determination and Education Assistance Act and the Indian Reorganization Act should be left undisturbed. Congress is, of course, well aware how to extend state laws to Indian reservations when it chooses and its failure to do so should be regarded as determinative.

Finally, application of state law will foreclose policy options which are the sole prerogative of Congress. It will take away the Tribes' ability to reach a level of economic self-sufficiency consistent with federal policy by utilizing

tax laws as an instrument of encouraging economic growth. If a policy decision is to be made that the Tribes should not utilize tax laws as a tool to govern the reservation and control the nature and extent of their economic growth, that decision is for Congress, not the legislature of the State of Washington.

IV. Enforcement of the Washington Cigarette Tax, R.C.W. Ch. 82.24, upon Tribally Taxed Sales of Cigarettes on the Reservation Will Result in Imposition of a Multiple Tax Burden Which Unconstitutionally Discriminates Against Indian Commerce in Violation of Article I, §8 of the United States Constitution.

In Section III B, *supra*, the Tribes demonstrated that *Moe* does not foreclose analysis of "negative implications" of the Indian Commerce Clause; it addressed only the lack of any constitutional "automatic exemption." Notwithstanding the absence of any "automatic" exemption, the Indian Commerce Clause prohibits application of state laws shown by the Tribes to discriminate against Indian commerce.

This distinction is highlighted by a parallel development in the interstate commerce decisions of this Court in which an analogous automatic exemption from state privilege taxes on interstate commerce had arisen. In *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), the Court overruled *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951), which had held that a tax on the "privilege" of engaging in an intrastate activity could not be constitutionally applied to interstate commerce whatever its actual practical impact. The Court noted that the previous rule had rendered

> irrelevant any consideration of the practical effect of the tax [and reflected] an underlying philosophy that interstate commerce should enjoy a sort of "free trade" immunity from State taxation.

430 U.S. at 278.

But in rejecting the automatic "free trade" exemption declared by the Court in *Spector Motor,* the Court left untouched its other decisions holding, for example, that states may not discriminate against interstate commerce. Thus, referring to its other cases, the Court noted that a state tax affecting interstate commerce would be upheld if the tax (1) had a sufficient nexus with the taxing state; (2) did not discriminate against interstate commerce; (3) was fairly apportioned; and (4) bore a fair relation to services provided by the taxing state. 430 U.S. at 277-78, 279.

Properly construed, the Court's footnote in *Moe* simply indicates that, parallel to the removal of the *Spector Motor* "automatic exemption" announced by the Court in *Complete Auto Transit,* no wholesale exemption for Indian commerce exists under the Constitution; the Court's language in *Moe* left unaffected, however, the necessary rule that notwithstanding the lack of any such automatic exemption, the states may no more discriminate against Indian commerce than against interstate or foreign commerce. The Tribes have shown such discrimination.

The factual predicate for the Tribes' assertion is undisputed. As stipulated in the Pre-Trial Order, the Colville Confederated Tribes levy a cigarette tax of four cents per package ($.40 per carton), while the Lummi and Makah Tribes levy a tax of five cents per package ($.50 per carton). Each tribal ordinance provides that the cigarette tax imposed by the Tribe is a tax upon distribution of cigarettes on the Reservation and requires the tax to be added

to the retail selling price. Pre-Trial Order § 2.5, App. 32-34. *See also* District Court Opinion, 446 F. Supp. at 1347, J.S. App. at 7. The state cigarette tax, on the other hand, amounts to $.16 per package ($1.60 per carton). At the present time, due to the smaller tribal tax, 90% of the sales of cigarettes by the Tribes are to non-Indians. 446 at 1347, J.S. App. at 7.

The economic effect of superimposing the state tax on the tribally-taxed sales of cigarettes will be that cigarette excise taxes totaling $.21 (Makah and Lummi) or $.20 (Colville) per package will be imposed on cigarettes sold to non-Indians by the tribal outlets while cigarettes sold *off* the Reservation will be subject only to the $.16 state excise tax. Dr. Trosper, an expert witness for the Tribes, testified:

> [i]f the two excise taxes were applied on the Reservations, the Indian tribal outlets would have a price disadvantage and could no longer successfully compete with nearby cigarette retailers located off the Reservation.

Exhibit 10.19 to Pre-Trial Order, App. 129. As the District Court summarized:

> The State tacitly concedes the Tribes' source of cigarette tax revenue would dry up if they were forced to add the State tax to the costs of their cigarettes. The facts dictate that the tribal taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and the cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus, each Tribe's ability to fund its sponsored programs would suffer substantial interference.

446 F. Supp. at 1347, J.S. App. at 7-8. The state taxing jurisdiction cannot be applied to effect such a result consistent with the Commerce Clause decisions of this Court.

In analyzing the validity of a state tax subjected to attack under the Commerce Clause, the Court focuses its attention on the practical operation of the tax. *See Halliburton Oil Well Cement Co. v. Reily*, 373 U.S. 64, 69 (1963); *Nelson v. Sears, Roebuck and Co.*, 312 U.S. 359, 363 (1941). *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), likewise mandates consideration of whether the tax causes a practical economic effect forbidden by the Commerce Clause rather than of formalistic considerations. 430 U.S. at 288.

Judged by these standards, the state tax as applied to the Tribes, must fail. Notwithstanding the State's rhetoric concerning its "sovereign power over its non-Indian citizens," State. Br. at 65, the real question is whether the tax, as applied, produces a forbidden effect on Indian commerce. This question is resolved by reference to the well-established principle that since a state may not discriminate against interstate commerce, such commerce cannot constitutionally be subjected to the burden of multiple taxation. *Gwin, White and Prince, Inc. v. Henneford*, 305 U.S. 434, 438-39 (1939). Although interstate commerce may be made to "pay its own way," *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959), a state may not "impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business . . . or by subjecting interstate commerce to the burdens of 'multiple taxation.'" *Id.* Even a tax which does not discriminate against interstate commerce when viewed in isolation or on its face, is nevertheless invalid under the Commerce Clause if it places on interstate commerce

> burdens of such a nature as to be capable . . . of being imposed, . . . or added to, . . . with equal

> right by every state which the commerce touches, . . . so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.

Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 255-56 (1938).[65]

While it is true that the taxpayer has the burden of establishing a multiple burden, *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), the Tribes have sustained that burden by showing that the Indian commerce will bear a greater tax burden than off-reservation sales of cigarettes if the state tax is imposed. *See Evco v. Jones*, 409 U.S. 91, 94 (1972), in which a state gross receipts tax levied against proceeds from out-of-state sales was held invalid because

> interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.

See also Standard Oil v. Peck, 342 U.S. 382, 84-85 (1952); *Central Railroad Co. v. Pennsylvania*, 370 U.S. 607, 612 (1962).

In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), this Court sustained a compensating use tax imposed by Washington which granted a tax exemption for anyone who had paid a sales or use tax in another state. 300 U.S.

65. One commentator has summarized the combined effect of these cases as follows:

> In defining the negative implications of the Commerce Clause for state taxation, the Supreme Court has emphasized two related but distinct consequences of state taxes, either of which renders a particular tax unconstitutional: (a) discrimination against out-of-state commerce in favor of local competitors; and (b) cumulative burdening of interstate commerce by several states' collection of similar taxes.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 354 (1978).

at 581. Although the Court reserved the question whether a state which imposed a compensating use tax would be constitutionally required to give credit for sales or use taxes paid on the same goods in another state, 300 U.S. at 587, most states have concluded that such credit is required. As of 1971, 30 states and the District of Columbia were giving credit in their compensating use tax for sales taxes paid in other states, and 12 states were providing reciprocal credit for sales taxes paid in those states which also provide credit.[66]

Although this Court has not yet had occasion to rule whether such credit *must* be given, the Court recently noted in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), that the Washington tax in *Henneford* was sustained because of the "equal treatment of interstate commerce" involved in the Washington scheme. The Court stated:

> Equal treatment of interstate commerce, lacking in [the case before the Court] has been the common theme running through the cases in which this Court has sustained "compensating" state use taxes. In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), Washington imposed a 2% sales tax on all goods sold at retail in the State. Since the sales tax would have the effect of encouraging residents to purchase at out-of-state stores, Washington also imposed a 2% "compensating tax" on the use of goods within the State. *The use tax did not apply, however, when the article had already been subjected to a tax equal to or greater than 2%. The effect of this constitutional tax system*

66. Only four states provide no credit in any circumstances. J. DUE, STATE AND LOCAL SALES TAXATION, 249-50 (1971). In addition, in 1976 the Multi-State Tax Compact was formed which was designed to bring greater uniformity of state action in the tax field; it requires all states to give credit for sales taxes paid to other states. *Id.* at 263. Washington is a member. *Id.*

was nondiscriminatory treatment of in-state and out-of-state purchases.

429 U.S. at 331. (emphasis added)

In the instant case, on the other hand, the State gives strong incentive to its citizens to avoid engaging in cigarette trade with the Tribes since they will be penalized by being forced to pay a higher total tax than if they transact business off the reservation. Such discrimination by the State is prohibited; it violates the constitutional premise that "equal treatment for in-state [on-reservation] and out-of-state [off-reservation] tax payers similarly situated is the condition precedent" for a valid state tax on transactions protected by the Commerce Clause. *See Halliburton Oil Well Cement Co. v. Reily*, 373 U.S. 64, 70 (1963).

Perhaps anticipating these arguments,[67] the State argues that nothwithstanding the imposition of the tribal tax, the State may tax the same transaction: "[W]hat we have then is a classic situation of two jurisdictions—each having taxing power—exerting that power against the same individual or transaction." State Br. at 62. In support, the State cites *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Guaranty Trust v. Virginia*, 305 U.S. 19 (1938); and *Fort Smith Lumber Co. v. Arkansas*, 251 U.S. 533 (1920). None of these cases, however, involve interstate commerce; they merely hold that there is no prohibition in the Privileges and Immunities and Due Process Clauses against a state

67. In its Brief at 63 n. 47, the State says:

> Here, there is no claim that Washington's cigarette and sales taxes as applied to non-Indians purchasing cigarettes from reservation retailers, are discriminatory.

Obviously, the Tribes *are* arguing that the state tax as applied discriminates against Indian commerce. The same arguments were made to the District Court below. *See* Plaintiffs' Trial Brief 58-63; *see also* 446 F. Supp. at 1356, J.S. App. at 24.

tax on property or an activity that has already been taxed by another state.[68] In the context of interstate, foreign or Indian commerce, on the other hand, multiple taxation is prohibited if a cumulative burden is placed on the protected commerce that exceeds that borne by local commerce.

Finally, it is apparent that the existence of the tribal tax, and the resulting multiple tax burden, distinguishes this case from *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). In *Moe*, no tribal tax was imposed, 392 F. Supp. 1297, 1313, and no multiple tax burden discriminating against Indian commerce was imposed.

In conclusion, this section has demonstrated that Indian commerce, no less than foreign or interstate commerce, is federally protected, and, at a minimum, is immune from state discriminatory action. The fact that the Indian Commerce Clause was juxtaposed by the Founding Fathers to the Interstate and Foreign Commerce Clauses in Article I, § 8 strongly supports this analogy, particularly in light of the fact that originally the Indian Commerce Clause was entirely distinct.[69] The Founding Fathers clearly intended that parallel protections would be available for Indian commerce.

Since the state cigarette excise tax, unlike the compensating use tax involved in *Henneford, supra*, is not properly

68. In *Austin*, however, the Court struck down a New Hampshire tax which purported to tax the income of non-residents while no similar tax was filed against resident employees on the basis of a "rule of substantial equality of treatment for the citizens of the taxing State and non-resident tax payers." 420 U.S. at 665.

69. *See* Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 MINN. L. REV. 432, 467-68 (1941). *See* note 46 and Section III A, *supra*.

"apportioned" in the sense that it gives no credit for taxes already paid to other jurisdictions, the Tribes have not addressed the potential issue of the validity of a state tax which *does* give credit for taxes already paid a tribe. That issue is simply not presented by this case and it would be premature to address it here.

However, while the analysis presented in this section considers Indian commerce to be analagous to interstate commerce, Section III strongly suggests that stricter standards apply. The Indian Commerce Clause, like the Foreign Commerce Clause, was designed largely to protect political as opposed to purely economic relations, and Indian commerce, like foreign commerce, enjoys a special status under the Constitution. *Cf. Japan Line, Ltd. v. County of Los Angeles*, ... U.S. ...., 60 L. Ed. 2d 336, 345-49 (1979). In addition, the previous sections demonstrate that federal statutes and policies protecting tribal government preempt state laws which infringe upon essential tribal governmental relations. Whatever the scope of these protections, it is clear, as an absolute minimum, that the state cigarette excise tax discriminates against Indian commerce and is therefore invalid.

V. The State Cigarette Tax, as Applied to the Tribal Enterprises, Has Been Preempted by the Federal Traders Statutes.

As this Court observed in *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 686-87 (1965):

> [F]rom the very first days of our Government, the Federal Government . . . [has] exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes.

The present statutes governing trading with the tribes are found in 25 U.S.C. §261, et. seq. which provides:

> The Commissioner of Indian affairs shall have *sole* power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quality of goods and the prices at which such goods shall be sold to the Indians.

(emphasis added) The operator of each of the respective tribal cigarette outlets is required by tribal ordinance to possess a federal traders license and, under the authority of the federal licensing scheme, conducts trade with both Indian and non-Indian customers. The question presented is whether, consistent with this Court's holding in *Warren Trading Post* and the federal statutes and regulations, the State of Washington can levy the tax in question and force the federal Indian trader to collect it.

In *Warren Trading Post*, the Court held an Arizona tax on the gross proceeds of a federal trader doing a retail trading business with Indians on the reservation to be preempted. In the instant case, the circumstances are reversed in that it involves Indian federal traders selling to non-Indians, but the reasoning of this Court suggests that the ultimate conclusion ought to be the same. As the Court summarized:

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that *Congress has taken the business of Indian trading on the reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.*

380 U.S. at 690. (emphasis added) And:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall

> be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed . . . .

Id. at 690-91. Indeed, in the instant case, since the federal traders are Indians, the preemptive scope of the statutes should be broader in scope.[70] Further, imposition of the state taxes in the instant case will have an even more deleterious effect because of the presence of the tribal tax. In all probability the commerce between the Indian traders and the non-Indians on the Reservations will be destroyed. To say that this is every bit as much a "financial burden" on Indian traders as the one disapproved in *Warren Trading Post* is an understatment.

Finally, the provisions of Excise Tax Bulletin 504.08.192, *see* §2.37 of the Pre-Trial Order, App. at 46, would add serious burdens to the federal traders. The Bulletin requires the federal traders to keep the names and tribal affiliations of all Indian purchasers, dollar amounts and days of sales, and to segregate sales to Indians and non-Indians. Since the focus of federal policy in the federal traders statutes is to avoid imposing financial burdens on Indian traders or on the Indians with whom they deal, these administrative burdens cannot be tolerated and were,

70. In its opinion the Court cited with approval an opinion by the Solicitor of the Department of Interior which had interpreted the federal statute to bar state sales taxes of sales *by* or *to* Indians. *See* 57 I.D. 129, 141 (1940), cited at 380 U.S. 690. The Solicitor stated:

> A sales tax placed upon sales *by Indian enterprises* or to Indians on the reservation or on the business of making sales would be an interference with the regulation of trade and prices by the Commissioner.

therefore, correctly struck down by the District Court. 446 F.Supp. at 1359, J.S. App. at 29-30.[71]

VI. The State Cigarette Tax Is Invalid Because Its Legal Incidence Falls upon the Tribe or Operator of the Tribal Outlet.

The arguments set forth above are premised upon an acceptance of the District Court's conclusion that the legal incidence of the state tax falls upon the non-Indian purchaser even though the State asserts that the Tribe or tribal outlet operator has the legal obligation under the state statute to collect the tax. An examination of this section of the District Court's opinion, however, as of the State's argument in support of this conclusion, reveals the mental gymnastics necessary to sustain the State's position on this issue. *See* 446 F. Supp. at 1351-56, J. S. App. at 15-24. Ultimately, the District Court's conclusion was premised on its acceptance at face value of the holding of the Washington State Supreme Court in *Tonasket v. State*, 84 Wn. 2d 164, 525 P.2d 744 (1974). However, in light of a series of inconsistent state court decisions, the Tribes believe that the *Tonasket* opinion can only be described as a charade.

The District Court correctly concluded that when a federal tax immunity is affected by a determination as to the legal incidence of the state tax, "the federal courts 'are not bound by the state court's characterization of the tax.' " 446 F. Supp. at 1352, J.S. App. at 17, citing *First Agricultural Bank v. Tax Commission*, 392 U.S. 339, 347 (1968).

71. The Tribes do not believe that this analysis is foreclosed by the Court's statement in *Moe*, 425 U.S. at 482, that *Warren Trading Post* did not apply to that case. The Indian retailers in *Moe* so far as the opinion reveals, neither applied for nor obtained federal traders licenses. The *Warren Trading Post* holding, therefore, was not directly implicated.

See also United States v. Mississippi Tax Commission, 421 U.S. 599 (1975).

The District Court also correctly ruled that since the state cigarette tax contains no mandatory provision requiring that the tax be passed on to the ultimate consumer, the decisions of this Court "do not necessarily require a conclusion that the legal incidence of State's cigarette tax is on the buyer." 446 F. Supp. at 1353, J.S. App. at 18. The District Court based its determination on divination of legislative intent, as guided by the Washington State Supreme Court in its *Tonasket* opinion.[72]

The operative sections of the statute which define the legal incidence of the Washington cigarette tax are found in RCW 82.24.020 and RCW 82.24.080. The former provides in part:

> There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in an amount equal to the rate of six and one-half mills per cigarette.

RCW 82.24.080 provides:

> It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, or possessed, or distributed within the state and *to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively in accordance with R.C.W. 82.24.020) or distributes them in this state. . . .*
>
> It is also the intent and purpose of this chapter that the *tax shall be imposed at the time and place of the first taxable event occuring within this state.*

(emphasis added)

72. The tax involved in the instant case is completely distinct from the tax involved in *Moe.* As the Supreme Court there emphasized, the Montana statute provided that the cigarette tax "shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only." 425 U.S. at 482. The statute also contained a provision that although the tax was to be paid in advance by the seller, it was to be "considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user." *See* 392 F. Supp., 1297, 1308. In determining the legal incidence of the Montana tax, therefore, the Court simply followed its previous holding in *United States v. Mississippi Tax Commission,* 421 U.S. 599, 608 (1975), that "where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser."

As noted above, the Washington state tax contains no such provision and its legal incidence is open to question.

Since the Appellee Tribes possess, handle and distribute cigarettes before they are sold to Indian or non-Indian consumers, a straightforward reading of the statute indicates that the legal incidence of the tax, being upon the first taxable event, would fall upon the Tribes. Indeed, that is how the State Supreme Court has interpreted the statute in a number of cases. In *Makah Indian Tribe v. State Tax Commission,* 72 Wn.2d. 613, 434 P.2d 580 (1967), the state court noted that in its practical operation, the Washington cigarette tax applied to and was paid by the wholesalers who distribute the cigarettes to retail outlets for resale. 72 Wn.2d 614, 434 P.2d 581. In *P. Lorillard Co. v. Seattle,* 83 Wn.2d 586, 521 P.2d 208 (1974), the court concluded:

> The person taxed is the person who first sells, uses, consumes, handles, possesses or distributes cigarettes in this state. R.C.W. 82.24.080.

Id. at 589, 521 P.2d at 210. Similarly, in *Canteen Service, Inc. v. State,* 83 Wn.2d 761, 522 P.2d 847 (1974), the state court stated:

> The legal incidence of a tax falls upon the person or entity who has the legal obligation to pay the tax. . . .
>
> The legal incidence of the cigarete stamp tax is upon the person who first sells, uses, consumes, handles . . .

> or distributes them in the State. R.C.W. 82.24.080. *Thus, the legal incidence of the tax will fall upon the one who first brings the cigarettes into the State and does any of the mentioned acts.*

Id. at 762, 522 P.2d 848. (emphasis added) According to the State, however, this analysis holds true in all cases except when the seller of the cigarettes is an Indian tribe or Indian.

In *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974), the state court, after noting that it was "dubious" whether the state cigarette tax could be applied to retail transactions with Indians, stated:

> [I]t would appear logical to conclude that the first taxable event would be the resale of the cigarettes to a non-Indian, at which time Mr. Tonasket [the tribal retailer] could be required to affix the tax stamp and collect the amount of the tax from the non-Indian consumer.

Id. at 181, 525 P.2d at 754. The State's construction of the Washington Supreme Court's language is that it means that an enumerated taxable event in the statute is not a taxable event unless it is constitutionally taxable. This maneuver, designed only to avoid the holdings of this Court in *McClanahan* and *Moe* regarding taxation of reservation Indians, cannot be sustained. Not only does it have no basis in the statute, but it leads to discriminatory results. In all other cases under the statute, RCW 82.24.080 explicitly provides that the legal incidence of the tax and the obligation to pay the tax fall upon the same person. In the case of an Indian tribe selling to a non-Indian, however, the State argues that the legal incidence bounces along the statutorily enumerated chain of events until it reaches the non-Indian but the obligation to pay the tax

remains with the Tribes.[73] The statute, so interpreted, clearly violates the Equal Protection Clause, *cf. Southern Ry. v. Greene*, 216 U.S. 400 (1910), and discriminates against Indian commerce. *Cf. Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). *See* Section IV *supra.*

Further, as to the practical enforcement of the statute, the State appears to be speaking out of both sides of its mouth. As noted in the Statement of Facts, the State has seized unstamped cigarettes from the Tribes and has indicated its intention to do so in the future. But if the legal obligation to affix the stamps and collect the tax does not arise until the cigaretes are sold to a non-Indian in conformity with the *Tonasket* holding, how can it be said that the Tribes have violated the law so as to bring into effect the State's enforcement mechanisms? If the State wants a tax statute which imposes the legal incidence of the tax on the consumer, it should amend its statute to so provide as to all cigarettes sold, and like Montana thereby avoid the dicrimination inherent in existing state law.[74]

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73. *See* RCW 82.24.260 which, as amended in 1975, provides in part:

> Any retailer who sells or otherwise disposes of any unstamped cigarettes other than . . . a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe shall collect from the buyer or transferee thereof the tax imposed on such buyer or transferee by R.C.W. 82.24.020 . . . and remit the same to the Department . . .

The statute applies only to Indians and tribes selling to non-Indians since in all other cases, the stamps will have already been affixed.

74. The Tribes will not attempt to fully address the other enforcement issues presented by this case. It its decision, the court below noted that in view of its conclusion that the state cigarette tax could not be lawfully applied to sales by the Tribes to non-Indians, any state enforcement would also be unlawful; it therefore declined to reach the merits of the Tribes' additional claims that the enforcement measures were independently violative of federal law and the Constitution. The Tribes will not discuss the issue further here, except to note that even if the state tax is valid, the enforcement problems are nevertheless substantial. For example, RCW 82.32.210 authorizes the State Tax Commission to levy

[Footnote continued on page 124]

VII. The State Motor Vehicle, Mobile Home, Camper and Travel Trailer Excise Taxes, RCW Ch. 82.44 and 82.50, Are Invalid as Applied to the Tribes or Their Enrolled Members.

This issue[75] arises because of the State's attempts to enforce its motor vehicle excise taxes on tribal and Indian-owned motor vehicles which are used both off and on the reservations. The State concedes that it may not tax Indian or tribally-owned vehicles which are used exclusively *on* the reservation, but argues that if vehicles are driven both on and off the reservation, *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), rather than *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973), controls and the state tax may be imposed. In light of the practical operation of the State's tax and the holding of this Court in *Moe,* however, the State's argument is untenable.

The critical language of the statute is found in RCW 82.44.020, State Br. App. R at 27a:

> An excise tax is imposed for the privilege of using in the state any motor vehicle, except those operated under dealer's licenses. The annual amount of such excise shall be 2% of the fair market value of such vehicle: *Provided,* That in no case shall the tax be less than $2.00.

RCW Ch. 82.50, imposing a tax on travel trailers and campers is to the same effect. State Br. App. S at 30a.

upon the real and personal property of the taxpayer. Obviously, application of these provisions to Indian trust property is problematic. Further, because these enterprises are run by the Tribes themselves, serious enforcement problems arise because of the Tribes' sovereign immunity. *See e.g. United States v. United States Fidlity and Guarantee Co.,* 309 U.S. 506, 512 (1940); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). If this Court does sustain the state taxes, the case should be remanded to determine the legality of the State's enforcement as applied to the Tribes.

75. The Tribes moved to dismiss this portion of the State's appeal in their motion to Dismiss or Affirm at 8 on the ground that the Notice of Appeal was not timely filed. Those arguments will not be repeated here.

While the excise tax is nominally on the "privilege of using in the State any motor vehicle," clearly the tax is imposed upon a percentage of the fair market value of the vehicle. The tax does not vary in amount with the proportion of on-reservation to off-reservation use. RCW 82.44.060 provides that the excise tax is due and payable at the time of registration of a motor vehicle. As the State explains in its Brief, State Br. at 111 et seq., payment of the tax is necessary in order to obtain a state registration and license.

The District Court's resolution of this issue is unassailable:

> Although there is no doubt that *Mescalero* would control if this issue involved use exclusively off the reservation, we do not agree that *Moe* is not controlling on the facts presented here. A review of the District Court's decision in *Moe* reveals that the vehicle use there taxed was partly on and partly off the Flathead Reservation. *Confederated Salish & Kootenai Tribes v. Montana,* 392 F.Supp. 1325, 1328-29 (D.Mont. 1975), *aff'd,* 425 U.S. 463 (Smith, J, concurring and dissenting). Moreover, the Montana tax invalidated in *Moe* was, except for labeling, identical in operation and effect to the tax here imposed.

446 F. Supp. at 1365, J.S. App. at 42. As the District Court noted, the State below and in its Brief to this Court seeks to distinguish *Moe* on the ground that the tax imposed by Montana was a "personal property tax" while the State's tax is labeled a "excise" or "privilege" tax. But both taxes are measured by the fair market value of the property at a given date each year, and there is no difference in practical operation between the two statutes. 446 F. Supp. at 1366, J.S. App. at 43. The question, therefore, is whether the Washington tax should be sustained simply because it has been more artfully drafted. The decisions of this Court, however, eschew such an approach when a question arises

as to the validity of a state tax challenged on federal grounds.

As noted above, in Section IV, *supra*, this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), strongly indicated that interstate tax cases should turn not upon "the formal language of the tax statute, but rather its practical effect . . . ." 430 U.S. at 279. Similarly, in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), the Court stated that in determining whether a state law stood as an obstacle to the accomplishment of the full purposes and objectives of Congress, the Court was required to "consider the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written."[76] 430 U.S. at 526.

This tax, notwithstanding its label, operates as a property tax because it is assessed annually on a given percentage of the fair market value of the motor vehicle. In these circumstances the tax cannot be sustained. As this Court observed in *Bryan v. Itasca County*, 426 U.S. 373, 377 (1976):

> On the authority of *McClanahan, Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) held this Term that in the absence of Congressional consent the State was disabled from imposing a personal property tax on motor vehicles owned by tribal members living on the reservation. . . .

76. Since the issue presented by the application of the State's tax relates to a state tax on reservation Indians, this issue is likewise a federal preemption issue. *See McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 462 (1976).

CONCLUSION

Imposition of the state cigarette excise tax will fundamentally interfere with the self-government of the Appellee Tribes. The state statute has a discriminatory impact on the Tribes because it will result in the imposition of a multiple tax burden not shared by off-reservation transactions and will ultimately not only be ruinous of the tribal tax systems, but also be destructive of the protected commerce with the Tribes. Further, the state tax infringes upon the constitutionally reserved prerogatives of Congress to govern political and economic relations with the Tribes. It is in irreconcilable and direct conflict with the policies of the United States as legislated by Congress and as approved by the Executive Branch in specific application to the tax ordinances of the Appellee Tribes. The judgment of the District Court should therefore be affirmed.

Respectfully submitted this 5th day of July, 1979.

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APPENDIX A

25 U.S.C. §476

§476. Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, §16, 48 Stat. 987.

APPENDIX B

25 U.S.C. §478b

§478b. Laws, treaties and rights unaffected by passage of sections 461 to 479

All laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote

to exclude itself from the application of sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said sections. Nothing in said sections shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said sections. June 15, 1935, c. 260, §4, 49 Stat. 378.

APPENDIX C

25 U.S.C. §450

§450. Congressional statement of findings

(a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the

diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

Pub. L. 93—638, §2, Jan. 4, 1975, 88 Stat. 2203.

25 U.S.C. §450a

§450a. Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

Pub. L. 93—638, §3, Jan. 4, 1975, 88 Stat. 2203.

APPENDIX D

25 U.S.C. §1301

§1301. Definitions

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United

States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possesed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

Pub. L. 90—284, Title II, §201, Apr. 11, 1968, 82 Stat. 77.

25 U.S.C. §1302

§1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Pub. L. 90—284, Title II, §202, Apr. 11 1968, 82 Stat. 77.

APPENDIX E

25 U.S.C. §1451

§1451. Congressional declaration of policy

It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Pub. L. 93—262, §2, Apr. 12, 1974, 88 Stat. 77.

APPENDIX F

28 U.S.C. §1362

§1362. Indian tribes

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Added Pub. L. 89—635, §1, Oct. 10, 1966, 80 Stat. 880.